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R E P O R T S

O F

C A S E S,

UPON

Appeals and Writs of Error,

IN THE

High Court of Parliament;

From the Year 1701, to the Year 1779.

WITH

T A B L E S, N O T E S and R E F E R E N C E S.

BY JOSIAH BROWN, Esq.

BARRISTER AT LAW.

VOLUME THE THIRD.

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O F T H E

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CASES

C A S E S

HEARD and DETERMINED

IN THE

High Court of Parliament.

The Right Honourable *Thomas Lord Howard of Effingham*, and *Elizabeth Lady Effingham* his Wife, late Widow of *Sir Theophilus Napier*, Bart. who was eldest Son and Heir of *Sir John Napier*, Bart. } Appellants.

Sir John Napier, Bart. an Infant, *George Buckby*, *Thomas Denton*, *Sir George Warburton*, *John Coppin*, Esq; and *Francis Brace*, } Respondents.

Et è contra.

19th February, 1724.

SIR *John Napier*, grandfather of the respondent *Sir John*, was, in his life-time, and at his death, seised of an estate in *Yorkshire* of about 1550*l.* per ann. for his life; with remainder to his first and other sons, by Dame *Elizabeth* his wife, in tail male successively; subject to a rent-charge of 1000*l.*

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per ann. for her life, for her jointure, commencing from his death; and he was also seised in fee of the manor of *Luton-Hoe* and other manors and lands in the counties of *Bedford* and *Hertford*, of 2500*l.* *per ann.* subject to great mortgages and incumbrances; part of which estates, of about 500*l.* *per ann.* were settled by him on his younger sons, *Archibald* and *Edward Napier*, and their issue male.

On the 2d of *March*, 1710, a commission of lunacy issued against *Sir John Napier* the grandfather, and he was thereupon found a lunatic, and so continued till his death, which happened in 1711, leaving Dame *Elizabeth* his widow, and four children, namely, *Theophilus*, *Archibald*, *Edward* and *Frances*. And, soon after his death, the whole family were engaged in several suits and controversies, touching their respective claims to his real and personal estates.

Sir Theophilus, the eldest son, having given a judgment of 8000*l.* penalty to his sister *Frances*, for securing her portion of 4000*l.* given her by her father's will, and mortgaged his estate in *Yorkshire* for 2000*l.*; intermarried in *March*, 1713, with the appellant Lady *Effingham*; but receiving no portion with her, no settlement was made upon the marriage; so that she became dowable at law of all his estates.

By indentures of lease and release, dated the 24th and 25th of *December*, 1714, reciting the marriage and the lady's right of dower, and that *Sir Theophilus* wanting monies to pay his debts, had sold or intended to sell some, and to mortgage other parts of his estate, and that to enable him thereto she had joined in levying fines, and thereby barred herself of her dower; and, that in consideration thereof, he had agreed to make a jointure on her, if she survived, and a provision for their issue male; and also reciting, that *Sir Theophilus* had agreed to settle the *Yorkshire* estate, of about 1600*l.* *per ann.* as after expressed; and that such estate was subject to the 1000*l.* *per ann.* rent-charge, and also mortgaged to Lord *Trevor* for 6000*l.* and interest, and charged with 4500*l.* and interest to the said *Frances Napier*, and that *Sir Theophilus* had agreed, that the said debts should be paid out of the *Bedfordshire* estate; he, in consideration of the premises, settled the *Yorkshire* estate to the use of such person or persons, and for such estates and uses, as he
and

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and his Lady should, by deed, jointly appoint; and, for want of such appointment, to the use of them two, for their lives, and the life of the survivor of them, and in bar of her dower; remainder to the heirs male of their two bodies; remainder to Sir *Theophilus*, and his heirs and assigns for ever: With a power of revocation by Sir *Theophilus* and his Lady, and a covenant from him to discharge the said debts, out of the *Bedfordshire* estate; and that the *Yorkshire* estate should only be charged with the rent-charge of 1000*l.* *per ann.* and be enjoyed by his said wife clear of all other incumbrances.

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On the 28th of *December*, 1715, Sir *Theophilus* made his will; and thereby devised to his Lady and her heirs, the inheritance of his estate in *Yorkshire*, and also 400*l.* *per ann.* out of his *Bedfordshire* estate; and gave her all other his lands and estates, in the counties of *Bedford* and *Hertford*, for life, without impeachment of waste; remainder to his nephew the respondent, Sir *John*, and his heirs; subject to a proviso, that he should not disturb the Lady in the enjoyment of the lands devised to her; and having charged all the premises with the payment of his debts, he made his Lady sole executrix, and residuary legatee of all his personal estate.

The several suits and controversies subsisting in the family touching the real and personal estates of Sir *John Napier*, the grandfather, were afterwards referred to the Lord *Trevor*; who having made proposals of accommodation, the same were reduced into articles, dated the 21st of *December*, 1717, between Lady *Napier*, the grandmother, of the first part, Sir *Theophilus* of the second part, and the said *Archibald* and *Edward Napier*, the respondent Sir *John Napier*, and *Elizabeth* his sister, son and daughter of *Archibald*, of the third part; whereby it was, among other things, agreed, that the manor of *Luton*, and several other manors and lands in the counties of *Bedford* and *Hertford*, should be settled on Sir *Theophilus* for his life, without impeachment of waste, provided he left on the premises, at his death; 3000*l.* worth of timber; remainder to his first and other sons in tail male; remainder to *Archibald Napier* for his life, and to his first and other sons in tail male; with like remainder to *Edward Napier*, and his first and other sons in tail male; remainder to Sir *Theophilus's* right heirs; with a power to Sir *Theophilus*, and each succeeding tenant for

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life, to make a jointure of any part of the premises, except the mansion house and park; or by way of rent-charge, subject to taxes, on all the premises, not exceeding 300*l.* *per ann.* and that the premises should be also charged with 1000*l.* to be paid to the said *Elizabeth Napier*, the sister, on her marriage, and 40*l.* *per ann.* for her maintenance. — It was also agreed, that the particular estates therein mentioned, of about 500*l.* *per ann.* should be settled on the said *Archibald* and *Edward Napier*, for their lives; with remainders to their first and other sons in tail male, with remainders over; and with particular powers of charging the same: And that all the rest of Sir *John Napier* the grandfather's estate, both freehold and leasehold, in the counties of *Bedford* and *Hertford*, should be vested in trustees, in trust, to be sold for payment of his debts mentioned in a schedule annexed to the articles; amounting in the whole, for principal monies, to 12,569*l.* besides a great arrear of interest; subject to a proviso, that if Sir *Theophilus*, or his heirs, should pay the same in eighteen months then next; then the trust estates should be settled or conveyed to Sir *Theophilus*, his heirs and executors, respectively; but in case Sir *Theophilus*, or his heirs, should make default in such payment, then the trustees, and their heirs, should sell so much of the trust estates as should be sufficient to pay such debts; and convey the surplus thereof to Sir *Theophilus*, his heirs and executors, respectively; and that the person in possession of the mansion house should keep it in repair, and not dispark the park.

The respondent Sir *John*, and his sister, being infants, and consequently not bound by these articles, unless confirmed by the authority of Parliament; an act was therefore, 4th *Geo. I.* obtained, whereby the articles were established; and, that the same might be the better performed, it was, *inter alia*, enacted, that all the manors, lands, hereditaments and leasehold estates, late of the said Sir *John Napier*, the grandfather, in the counties of *Bedford* and *Hertford*, should, from and after the 24th of *June*, 1717, be vested in certain trustees therein named, their heirs, executors, and administrators, freed and discharged of all uses and estates, which might be claimed under any settlement or will executed by the said Sir *John Napier*, the grandfather; upon trust, with all convenient speed, to settle or convey the manors and lands, by the articles agreed to be settled, to and for

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for the uses and estates therein mentioned; and that the said trustees should, after the 25th of *June*, 1719, sell and dispose of all or any part of the residue of the said estates, both freehold and leasehold, not by the articles agreed to be settled; and, out of the monies arising by such sale, pay the said Sir *John Napier*, the grandfather's debts, as well those in the schedule to the articles, as also all other his just debts; and pay and apply the overplus of the monies, if any, to Sir *Theophilus*, his heirs, executors, and administrators; and convey and assure such part of the said freehold and leasehold estates, as should not be by them sold for the purposes aforesaid, to Sir *Theophilus*, his heirs and executors: And it was further enacted, that if Sir *Theophilus*, his heirs, executors, or administrators, should, before the 24th of *June*, 1719, pay all the said debts; then the trustees were to convey the residue of the said freehold and leasehold premises to Sir *Theophilus*, his heirs, executors, or administrators, respectively, for their own use and benefit.

Sir *Theophilus*, in order to make a provision and jointure for Dame *Elizabeth* his wife, by deed poll, dated the 26th of *March*, 1718, in consideration of his marriage with her, and in pursuance of the power given him by the said articles and act, did grant to her, in case she survived him, an annuity of 300*l. per ann.* subject to taxes, payable quarterly out of the settled estates, for her life, for her jointure, with power of distress.

By indenture tripartite, dated the 16th of *July*, 1718, reciting, *inter alia*, the former settlement of the *Yorkshire* estate on Sir *Theophilus's* Lady, for her jointure; and reciting also the said act, and Sir *Theophilus's* intentions to sell the *Yorkshire* estate, but that it could not be sold without his Lady's joining therein; and that he was desirous, the lands in *Bedfordshire* should be settled on his Lady as a compensation for parting with her said jointure; but that such lands were vested in trustees for payment of debts, as aforesaid, and that he could not make a good title thereto till the debts were paid and the lands conveyed to him; Sir *Theophilus* therefore, in consideration of the premises, and in order to make his Lady an equivalent, or compensation for her said jointure, which was valued at 1500*l. per ann.* granted and assigned the farms and lands therein particularly mentioned, to trustees and their heirs, to the use

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of himself for life, without impeachment of waste; remainder to the trustees and their heirs, upon trust to convey the same to such person, and for such estates and uses, as his Lady, by her will or deed in writing, notwithstanding her coverture, should direct and appoint; and, for want thereof, to her right heirs. With a power, that if Sir *Theophilus* should have more than one son, or any daughter by her, to charge such premises with 4000*l.* for them, to be paid immediately after his Lady's death, and not otherwise; and a covenant from Sir *Theophilus*, that he would, with all convenient speed, pay all Sir *John Napier's* debts, and procure the lands charged therewith, to be conveyed, by the trustees in the said act, to Sir *Theophilus* and his heirs, and do any other acts of assurance, and that the premises should be held free from incumbrances: And, as a security for his Lady's enjoying the said premises, he entered into a recognizance of 15,000*l.* penalty, conditioned for that purpose.

Soon after this settlement, Sir *Theophilus* sold the *Yorkshire* estate to the Marquis of *Carmarthen* for 40,000*l.* and thereout paid the greatest part of the debts mentioned in the schedule to the articles, and in the act, and left 13,000*l.* of the purchase money in the Marquis's hands, on a mortgage at interest, to secure him against the rent-charge of 1000*l.* per ann. to Lady *Napier*, the grandmother, for her life; and 1900*l.* other part of the purchase-money, was placed by Sir *Theophilus* in the hands of Mr. *Ellingham*, his steward.

Some short time afterwards, *Archibald Napier* died, leaving the respondent Sir *John*, his son and heir, and *Elizabeth* his daughter. And on the 5th of May, 1719, Sir *Theophilus* died without issue, leaving Dame *Elizabeth*, his relict, and the respondent Sir *John*, his nephew and heir at law; who, by virtue of the articles and act of Parliament, became tenant in tail of the estates in the counties of *Bedford* and *Hertford*, of about 1000*l.* per ann. charged with the 300*l.* per ann. settled in jointure on the widow, and with the 1000*l.* for his sister *Elizabeth's* portion, and 40*l.* per ann. for her maintenance; and the respondent also, as heir at law of Sir *Theophilus*, became intitled to the surplus of the trust estates, vested by the act in the trustees, after the debts were paid.

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The day after Sir *Theophilus's* death, his Lady, being his sole executrix and residuary legatee, proved his will; and, by virtue thereof, possessed all his ready money, goods and arrears of rent, and other personal estate of great value; and likewise received the 1900*l.* remaining in Mr. *Ellingham's* hands, besides the 13,000*l.* and interest due on the Marquis of *Carmarthen's* mortgage, being computed in the whole to amount to about 20,000*l.*

In June, 1719, the respondent Sir *John* exhibited his bill in the Court of Chancery against Lady *Effingham*, as the relict of Sir *Theophilus Napier*, and against *Edward Napier* and the trustees, praying an account of Sir *Theophilus's* personal estate, and to have satisfaction for a defect of reparations of the mansion-house, the same being left by Sir *Theophilus*, at his death, greatly out of repair: The bill also complained of the several settlements made by Sir *Theophilus* in favour of his Lady, except the 300*l.* *per ann.* jointure, made pursuant to the act; and prayed, that those settlements might be set aside, and that the mortgages and other securities, paid off by Sir *Theophilus*, might be assigned to attend and protect the several reversions thereon; and that the trustees in the act of Parliament might convey the trust estates, according to the articles and act.—Whereupon Lady *Effingham* exhibited her cross bill against the respondent Sir *John Napier*, and the trustees and others, to have the trust estates, not settled on her, sold for payment of the remaining debts of Sir *John Napier* the grandfather, and to be repaid the monies advanced by Sir *Theophilus*, in discharging the mortgages upon the trust-estate, as belonging to her as executrix; and to have a conveyance made to her and her heirs, of the estate settled on her by the deed of July, 1718.

To both these bills, the several defendants put in their answers, and witnesses were afterwards examined; but, pending these proceedings, the old Lady *Napier* the grandmother died, whereby her jointure of 1000*l.* *per ann.* determined.

On the 12th of December, 1721, both causes were heard before the Lord Chancellor *Macclesfield*; who decreed, that so much of the trust-estate, as was not comprised in the settlement of the 16th of July, 1718, should go and be applied according to the act; and as to such settlement, his Lordship declared,

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declared, that no fraud or circumvention appeared to set it aside, or to prevent the Court from carrying it into execution; and therefore dismissed so much of the respondent Sir John Napier's bill, as sought to set aside that settlement; and declared, it plainly appeared, that Sir Theophilus's intention was thereby to settle lands of the value of 500*l. per ann.* on the Lady Effingham and her heirs; and it being alledged, that the lands therein comprised, exclusive of the manor of Shitlington, were upwards of 500*l. per ann.*; that the manor itself was 180*l. per ann.* and that there was reason to believe, Sir Theophilus did not know the value of it, or was not apprised that it was included in the settlement, it being then inserted between two small farms, and so likely to pass unobserved, and not taken notice of by him; it was referred to the Master, to enquire into the annual value of the said manor, and state the same, with all circumstances relating to the inserting it in the settlement, and also to state the annual value of the other lands therein comprised; and decreed the trustees to convey such other lands to the Lady Effingham and her heirs, as the Master should direct, when the debts should be paid out of Sir Theophilus's personal estate; but as to any conveyance of the manor of Shitlington, his Lordship reserved the consideration thereof, till after the Master's report.—As to the debts paid off by Sir Theophilus, and the mortgage terms by which the same were secured being assigned to him, and whether they ought to have attended the inheritance of the lands, or whether the Lady Effingham, as his executrix, ought to have the benefit thereof, as part of his personal estate; his Lordship declared, that the mortgage terms which had been assigned by Sir Theophilus, were, in his executrix, a trust for the persons who were respectively intitled to the inheritance of the several lands therein comprised, for the protection of such inheritance; and decreed, that such of those terms, which concerned the lands belonging to the heir at law, should be assigned to trustees, to attend the inheritance of those lands; and that such of the mortgage terms, as comprised the lands in the settlement of the 16th of July, 1718, should be assigned to such trustees, to protect the inheritance thereof. And as to the debts which affected the other estate, his Lordship declared the leasehold estate, as assets of Sir John Napier the grandfather, was liable to the payment thereof; and therefore dismissed so much of the Lady Effingham's cross bill, as sought to make the said leasehold estate, and the mort-

gage terms, part of Sir *Theophilus's* personal estate; and decreed, that Sir *John Napier's* debts, remaining unpaid, should be first satisfied out of the said leasehold estate; and, that as any mortgage terms should be afterwards discharged, the same should be assigned to protect the inheritance of the lands therein comprised; and when the whole trust estate should be discharged of the debts, which it was subject to, then the trustees were to assign so much thereof, as was not comprised in the settlement to the respondent Sir *John Napier*, the heir at law. And directions were given touching the repairs of the mansion-house, which, by the articles and act, Sir *Theophilus* was to do; and for taking the receiver's accounts of the trust estate, timber and wood monies, and appointing another receiver; but no costs were given on either side.

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On this hearing it appeared, by the instructions taken by Mr. *Bennett* from Sir *Theophilus*, for drawing the settlement of July, 1718, and which were produced in Court, that there was an interlineation made therein, for limiting the inheritance of the lands to the Lady *Effingham*, and written in a different ink; and Mr. *Bennett*, being present in Court, owned such interlineation to have been made by him, after Sir *Theophilus's* death.

Soon after pronouncing the decree, and before any report was made, the Master, Mr. *Hiccocks*, surrendered his office, and was succeeded by the said Mr. *Bennett*, by whom the settlement of July, 1718, was drawn; who, on the 22d of January, 1723, made a special report, and thereby *inter alia* stated, that Sir *Theophilus* owned his Lady's kindness to him, in her joining in the sale of the *Yorkshire* estate, being about 1500*l.* or 1600*l.* per ann. settled on her in jointure, and desired to recompence her for it; and thereupon directed the drawing the settlement of July, 1718, to secure her and her heirs, at least 500*l.* per ann. as an equivalent or satisfaction for parting with her said jointure: That a rental of lands was prepared by him, and sent inclosed in a letter to Mr. *Bennett*, wherein Sir *Theophilus* said, he had sent a particular of the lands to be put into his wife's settlement, which amounted to 500*l.* per ann. and desired a statute for 15,000*l.* might be prepared, for securing the same. As to the yearly value of the manor of *Shitlington*, the report stated the depositions of several witnesses, taken on the respondent Sir *John's* behalf, some of which proved the fines and

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quit-rents, and other profits of the manor, to amount to 180*l.* *per ann.* and others less; and some proved the copyholds in hand, belonging to the manor, to be 1100*l.* *per ann.* and the fines at the will of the Lord; and the manor to be worth between 4000*l.* and 5000*l.* to be sold; but concluded nothing certain as to what the true value of the manor was, or had been. And as to the yearly value of the lands in the settlement of July, 1718, exclusive of the manor of *Shitlington*, the Master certified, that the same were of the yearly values in the said settlement mentioned, save some small under-valuations, and also some over-valuations particularly mentioned in his report, and that one parcel, called *Hanscomb Laywood*, valued in the rental and settlement at 13*l.* *per ann.* was, together with the manor of *Shitlington*, liable to a fee-farm rent of 78*l.* 7*s.* 2*d.*

The confirmation of this report, and some of the subsequent proceedings, having been irregular as to Sir *John Napier* the infant, he, by petition to the Lord Chancellor, complained of such irregularity. And, on the 4th of June, 1724, the matter of this petition came on to be heard, when the several instances of irregularity being proved by affidavits, and it also appearing, that the estates comprised in the settlement of July, 1718, were of greater value than 500*l.* *per ann.* exclusive of the manor of *Shitlington*, and that the said manor and profits thereof could be let for 200*l.* *per ann.* certain; his Lordship did not think proper to send it back to the Master to review his report, or to give judgment thereon, as the same then was; but ordered, that the order for confirming the report should be discharged, with liberty for the respondent Sir *John* to bring a new or supplemental bill, as counsel should advise, to be relieved touching the said manor of *Shitlington*; and, in the mean time, the trustees were to hold courts for such manor, and the Master to appoint a receiver of the quit-rents and fines thereof, and the same were to be applied to pay such debts as affected that estate, and the surplus to be put out at interest on securities, subject to further order; and the Master was to state the debts of Sir *John* the grandfather yet unpaid, and the appellants were to deliver to the respondent Sir *John Napier*, a *fac simile* copy of the rental of the lands which Sir *Theophilus* intended to be settled on his Lady, and of his letter to Mr. *Bennett*, and of the indorsements thereon, containing instructions for drawing the said settlement.

From

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From the whole of this order, and from so much of the decree as directed an inquiry into the value of the manor of *Shitlington*, or any of the other lands comprised in the settlement of *July*, 1718; and as declared that the mortgage terms which had been assigned to *Sir Theophilus*, were a trust in his executrix, for the persons intitled to the inheritance of the lands therein comprised; and as dismissed so much of the cross bill, as sought to make those terms part of the personal estate of *Sir Theophilus Napier*; and as postponed the conveyance to *Lady Effingham*, till the debts of *Sir John Napier* should be paid out of *Sir Theophilus's* personal estate; and as declared the leasehold estates, as assets of *Sir John Napier*, to be liable to the payment of the debts which affected the other estates; and as dismissed so much of the cross bill, as ought to make those leasehold estates part of the personal estate of *Sir Theophilus Napier*; *Lord and Lady Effingham* appealed.

Sir John Napier, the infant, also appealed from so much of the decree, as declared that no fraud or circumvention appeared in the settlement of *July*, 1718, sufficient to set it aside, or prevent the Court from carrying it into execution; and as dismissed so much of the original bill, as related to that settlement.

And in support of the original appeal, it was said, that upon the *Lady Effingham's* agreeing to part with her settlement of the *Yorkshire* estate, *Sir Theophilus* promised her an equivalent for it; and as that estate was upwards of 1500*l.* *per ann.* any conveyance of lands in fee, in lieu thereof, could not be less than 500*l.* *per ann.* But considering that the lands comprised in the settlement of *July*, 1718, were chargeable with 4000*l.* for the portions of daughters, or younger children, it was but just that they should be of greater yearly value than 500*l.*; for otherwise, if the contingency happened, and 4000*l.* were to be raised thereout, it was very plain, that *Lady Effingham* would not have had such an equivalent as was intended for her. That *Sir Theophilus Napier* being intitled, according to the act of Parliament, to a conveyance of all the trust estate in question, he had a power of disposing thereof as he thought proper; and he having directed the settlement of *July*, 1718, to be prepared, and the same being prepared and executed after great deliberation, and without any circumstance or colour of fraud

P. Yorke.
C. Wearg.

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or circumvention, it was hoped, that the cross appeal would be dismissed; and that the respondents the trustees, in whom the legal estate was vested, would be decreed to convey to Lady *Effingham*, as well the manor of *Shitlington*, as all other the premises contained in that deed, and that she should hold and enjoy the same accordingly; especially as it now appeared, after so great examination, which had occasioned much delay and expence, that the respondent Sir *John Napier* had not the least probability of being able to impeach the deed; not so much as an affidavit of any circumstances of fraud, having been hitherto produced. As to the mortgage terms paid off by Sir *Theophilus Napier*, and of which assignments were taken to, or in trust for him, his executors and administrators, it was hoped, that the Lady *Effingham*, as his executrix, was entitled to the benefit thereof; because those assignments were taken after Sir *Theophilus* had made his will, whereof he constituted his wife sole executrix and residuary legatee; so that when he took them in his own name, he well knew they would of course vest in her: And it was conceived to be much more unreasonable, that the respondent Sir *John Napier* should have the benefit of these terms, when there was not the least proof that Sir *Theophilus* ever intended it; but, on the contrary, that he intended his wife to have the full benefit thereof. That the covenant in the settlement of *July*, 1718, whereby Sir *Theophilus* agreed with his wife's trustees to pay Sir *John Napier's* debts, was intended only that she might enjoy the estate thereby conveyed for her benefit, clear of any of the debts of Sir *John Napier*; and therefore ought not to be extended beyond that intention, so as to exempt the trust estate from the payment of those debts, according to the act of Parliament, or to make Sir *Theophilus*, or his personal estate, pay the same, unless the residue of the trust estate was deficient; especially, as the respondent Sir *John* sought to set aside that very deed, under which, upon this part of the case, he claimed this advantage. And forasmuch as the leasehold estate, formerly Sir *John Napier's*, was by the act, after discharge of the debts, vested in Sir *Theophilus*, his executors and administrators, to which Lady *Effingham*, as his executrix, was entitled, as well as to his other personal estate; it was conceived, that this leasehold estate ought only to be liable, in respect of its value, to a proportion of the debts charged on the trust estate in general, and that no direction ought to have been given for a sale of it; and

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and the rather, because Lady *Effingham* had been at the charge of renewing the lease, and, by her answer to the original bill, had admitted assets of Sir *Theophilus*, sufficient to answer any demand of the respondent: And as to the costs of the suits, it was insisted, that there did not appear any sufficient reason, why the appellant Lady *Effingham* had forfeited, or was not entitled to her costs; and that therefore, she ought to receive the same, either from the respondent Sir *John Napier*, or at least out of the trust estate.

To all this it was answered, on the part of the respondent Sir *John*, that as to the inquiry directed by the decree, it was highly reasonable; and that the circumstances of inserting the manor of *Sbitlington* in the rental, and also in the conveyance of the lands, to be settled on Lady *Effingham*, between two small farms of 9*l.* and 4*l.* per ann. each, and there being lands sufficient to answer 500*l.* per ann. exclusive of the manor which was of considerable yearly value, were conceived to be sufficient grounds for the court to direct such an inquiry; especially as it was the case of an infant, whose inheritance was to be bound, and where the defence of his title appeared to have been greatly neglected and mismanaged. That the appellants acquiesced in this inquiry, until it came out, that the estates comprised in the settlement of *July*, 1718, notwithstanding what was stated by the report, amounted to more than 500*l.* per ann. exclusive of the manor of *Sbitlington*, which was worth 200*l.* per ann. And as to the order of the 4th of *June*, when it clearly appeared to the Court, that the infant's interest had been neglected, and that the report was defective and prejudicial to him; there was certainly good reason, as well to discharge the order confirming the report, as for giving him liberty to prefer a new, or supplemental bill, wherein every thing material on his part, might be regularly put in issue. That as to the mortgage terms paid off by Sir *Theophilus* in his life time, they were raised for a particular purpose, namely, to secure the monies lent thereon; and that purpose being answered by payment of the monies, the terms of course became, in equity, attendant on the inheritance: And if this were otherwise, the monies stated in Lady *Effingham's* answer to have been paid by Sir *Theophilus* on account of these mortgages, would exhaust the whole trust estate; and then Sir *Theophilus's* father dying seised in fee of the equity of redemption of the

T. Lutwyche.
W. Peere
Williams.

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mortgaged premises, such equity was assets by descent in the hands of Sir *Theophilus*; and he being entitled to the fee and inheritance of the trust estate, when he paid off the mortgages, he thereby disincumbered his own estate, and his executrix ought not to have the benefit thereof. As to that part of the decree, which directed the leasehold estate of Sir *John Napier*, the grandfather, to be first applied towards the payment of his debts, it was just and reasonable; because it is the constant rule of equity, that the personal estate of the debtor shall be first applied in payment of his debts, in case of the real estate; equity always preferring the heir, to the executor or administrator. And as to costs, it was insisted, that there was no reason why the appellants should have any; they having insisted on many things which were determined against them, and others being reserved for an inquiry; and especially in a case where it appeared, that the Lady had so large a share of the family estate.

And in support of the cross appeal, it was contended, that Sir *Theophilus*, at the time of making the settlement of July, 1718, not having the legal estate in those lands, could not pass a legal estate to his Lady; and consequently she had no means to come at the same, but by a Court of Equity. That this settlement was founded upon recitals of her being entitled to much larger dower, and a more valuable jointure, than in fact she was; and upon the face of it, as well as from the other circumstances of the case, appeared to be unreasonable, and to contain extraordinary clauses: Besides, the words for limiting the inheritance being interlined after the death of Sir *Theophilus*, rendered it extremely doubtful, whether he intended to pass away such inheritance, and dismember the same from his honour and family; but at least, in this as well as any other case, where an infant's inheritance is in dispute during his minority, the usual time ought to be allowed him to shew cause against such decree, on his coming of age.

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varied.
JOUR. vol. 22.
p. 426.

AFTER hearing counsel on these appeals, it was ORDERED and ADJUDGED, that so much of the decree of the 12th of December, 1721, as directed, "that so much of the estate, and
"the rents and profits thereof, as was not comprised in the
"settlement made by Sir *Theophilus Napier*, on the appellant
"the Lady *Effingham*, by the deed of settlement of July, 1718,
"should

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“ should go and be applied according to the act of Parliament,” should be affirmed: And as to so much of the said decree, as ordered the respondent Sir *John Napier*’s bill to stand dismissed, so far as the same sought to set aside the said settlement of the 16th of *July*, 1718, the same was affirmed, with this addition, viz. “ unless the said Sir *John Napier* shall, within six months after he shall attain his age of 21 years, shew cause to the Court of Chancery to the contrary.” And it was further ORDERED, that the trustees should convey the manor and lands comprised in the said settlement of the 16th of *July*, 1718, to the Lady *Effingham* and her heirs, as the Master should direct; unless the said Sir *John Napier* should, within six months after he should attain his age of 21 years, being served with process of the said Court for that purpose, shew cause to the said Court to the contrary. And it was further ORDERED and ADJUDGED, that the possession of the said manor of *Shitlington*, and the other lands comprised in the said deed of settlement, should be forthwith delivered to the appellants in the original appeal, who were at liberty to hold Courts for the said manor in the names of the trustees, in whom the legal estate of the said manor was vested; and such trustees were to do all acts necessary for that purpose, being thereby indemnified for so doing; and that the rents, issues and profits, of the said manor and lands comprised in the said settlement, should be paid to the appellants in the original appeal, and the heirs of the appellant the Lady *Effingham*, until the said Sir *John Napier* should attain his age of 21 years, and shew cause to the contrary as aforesaid; subject nevertheless, to the further order and direction of the said Court of Chancery. And as to that part of the said decree, which related to what the Lady *Effingham* was entitled to by virtue of the said settlement; and the Lord Chancellor’s declaration, concerning the intention of Sir *Theophilus Napier*, as to the value of the lands to be comprised in the said settlement; and the several allegations concerning the manor of *Shitlington*, and the order of reference thereupon to the Master, to inquire into the clear annual value of the said manor, and to state the same, and also the annual value of the said other lands; and that the respondents the trustees should convey the said other lands to the Lady *Effingham* and her heirs, when the debts should be paid out of the personal estate of Sir *Theophilus Napier*; and that the consideration of any conveyance of the said manor should

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should be reserved, till after the said Master should have made his report; it was ORDERED and ADJUDGED, that the same should be reversed; and all subsequent proceedings, directions and orders of the said Court of Chancery, pursuant thereunto, were likewise set aside and reversed: And as to all the rest and residue of the said decree, the same was affirmed; with this further direction, as to that part of the decree which ordered, “that the debts remaining unpaid should be first satisfied out of the leasehold estate of Sir John Napier deceased, and the personal estate of the said Sir Theophilus Napier;” that the Lady Effingham should be first allowed, out of the said leasehold estate, and the rents and profits thereof by her received, the fine and necessary charges which she paid or expended, upon her renewing the said lease; and that if the surplus of the money arising by or out of the said leasehold estate, and the profits thereof, should not be sufficient for the payment of the said debts, the residue of the debts, remaining unsatisfied, should be paid out of the personal estate of the said Sir Theophilus Napier: And it was further ORDERED, that the said Court of Chancery should give directions, from time to time, as the said Court should think just, for carrying this judgment, and every part of the said decree thereby affirmed, into execution.

Case 2. *William Wekett*, Esq; and *Mary* his } Appellants.
Wife, - - - - - }

John Raby, Serjeant at Law, - - Respondent.

23d February, 1724.

THERE was a great intimacy, for several years, between *Walter Pigot*, Esq; deceased, and the respondent; Mr. *Pigot* employing him as his counsel, and supplying him from time to time with several sums of money, as his occasions required: But, Mr. *Pigot* suspecting that a mortgage which the respondent had given him, for securing the repayment of part of the money so lent, was fraudulent, and that he had no title to the lands which he so mortgaged, he was greatly displeased with the respondent; and on the 12th of July, 1718, he

he stated and adjusted all accounts with him, and the money then due to Mr. *Pigot* for principal and interest being 335*l.* 5*s.* Mr. *Pigot* generously gave 100*l.* to the respondent for his fees and other services; and, on the respondent's earnest solicitation, delivered him up the mortgage, as a security of no value, and accepted his bond for the residue of the said debt, being 235*l.* 5*s.*; which was all the security, as the respondent then declared, he was capable of giving for the same: And the respondent did, at the same time, execute a general release to Mr. *Pigot*, which he required from the respondent, to the end, as he declared, that the respondent might not make large demands after his death, on the appellant *Mary*, for business never done; and Mr. *Pigot*, from that time to the time of his death, was not in friendship with the respondent.

Mr. *Pigot*, many years before his death, and from the time that the appellant *Mary* was six years old, had a great friendship and acquaintance with Mr. *Thornhill*, her father, at whose house he often lodged, using the same as his own; and being under many obligations to Mr. *Thornhill* and his family, Mr. *Pigot* on the 13th of *February*, 1716, duly made his last will in writing, and thereof appointed the appellant *Mary* his executrix and residuary legatee; and on the 22d of *March*, 1718, died. But in his last sickness, and a few days before his death, made this declaration touching the respondent's bond, viz. "I have *Raby's* bond, which I keep; I don't deliver it up, for I may live to want it more than he; but when I die, he shall have it, he shall not be asked or troubled for it."

After the death of Mr. *Pigot*, the respondent being present at the inspection of his papers, amongst which was found the said bond, applied to the appellant *Mary*, and desired she would make him a present of it, but did not pretend any right thereto; and to induce the appellant *Mary* to deliver the same up, he promised to be her counsel, and to serve her on all occasions as long as he lived; and several of the testator's relations, then present, backed the respondent's request, and told the appellant *Mary*, they would also take it as a favour; upon which, and other assurances of the respondent's friendship, the appellant *Mary* told him, *you may be easy, for it is safe in my hands.* But the respondent hinting at accidents which might put it out of her power,

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power, such as matrimony; the appellant *Mary*, in confidence of the respondent's assistance and friendship, replied, *if I marry I will deliver the bond to you the night before.*

The respondent having afterwards acted, as the appellant *Mary* apprehended, in many respects very unfriendly by her; and she intermarrying with the other appellant, they caused the said bond to be put in suit against the respondent.

To stay the proceedings in which suit by injunction, the respondent, in 1721, exhibited his bill in the Court of Chancery against the appellants; charging therein, that Mr. *Pigot* had given express orders to the appellant *Mary*, to deliver up the said bond, and prayed a discovery thereof, and that the same might be delivered up accordingly.

To this bill the appellants put in their answer; and the appellant *Mary* positively denied, that Mr. *Pigot* ever gave her any orders to deliver up the bond; but owned that he declared, in his last sickness, and within a few days before his death, that if the respondent proved her friend, and was not able to pay the bond, she might then spare him, as he deserved; and that Mr. *Pigot*, at the same time, gave directions about his funeral; and that this was the last discourse of Mr. *Pigot* to her, touching the said bond, or any other of his temporal concerns.

On the 22d of *February*, 1723, the cause was heard before the Lord Chancellor *Macclesfield*, who was pleased to decree, that the bond should be delivered up to be cancelled, and satisfaction acknowledged on the record of the judgment given by order of Court upon the said bond; and that the appellants should pay the respondent his costs, both at law and in equity, to be taxed by the Master.

J Darnall.
W. Hamilton.
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From this decree the appellants appealed; insisting, that it was not pretended by the respondent, that he ever paid or satisfied the bond in question, or that the same was not given for an honest and just debt, or that he was not in circumstances to discharge it. That the appellant *Mary* expressly swore in her answer, that Mr. *Pigot* gave her no orders to deliver up the bond; and as to the respondent's pretence, that such orders

were

were given in consideration of, and as a recompence for his great services, it appeared by the proofs in the cause, that the respondent received and accepted of 100*l.* from Mr. *Pigott*, in full for such services; which Mr. *Pigott* then declared he thought a sufficient gratuity for what the respondent had done for him, and therefore required a general release, which was accordingly given. That it was of very dangerous consequence, to admit proof of parol orders, to defeat a written will; but as this fact was denied by the answer, and not supported by the proofs in the cause, the bond ought not to have been decreed to be delivered up; but the most that should have been done, was to have directed a trial at law, and which the appellants counsel prayed for at the hearing. That as the respondent's pretence for having the bond delivered up, was founded only upon a voluntary order, without any valuable consideration, and as the action brought upon the bond, was in the appellant *Mary's* capacity of executrix; it was conceived, that under these circumstances, there were not sufficient grounds for making the decree.

On the other side it was contended, that a parol order, attended with Mr. *Pigot's* declarations in his last sickness, and his express directions given to the appellant *Mary*, her acknowledgment thereof, and her express promise to deliver up the bond, pursuant to those directions, were sufficient evidences of a trust reposed in her by the testator for that purpose; and her promises were also sufficient to enforce a performance of such trust. That the respondent's equity was founded on matters within the knowledge and privity of the appellant *Mary*, and on her own breach of trust, in putting the bond in suit, contrary to the testator's orders, and her express promises; and therefore the appellants were very justly decreed to pay the respondent his costs, both at law and in equity.

T. Reeves.
C. Talbot.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that so much of the decree complained of, as ordered, "that the bond given by the respondent to *Walter Pigot*, Esq; should be delivered up to be cancelled; and that satisfaction should be acknowledged on the record of the judgment given by order of the Court upon the said bond," should be affirmed: And it was further ORDERED and ADJUDGED, that the remaining part of the said decree, which directed,

DECREE
reversed in
part.
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directed, " that the appellants should pay the respondent his
" costs, both at law and in equity, to be taxed by one of the
" Masters of the same Court ;" should be reversed.

Sir *William Pendarvis*, Knt. and Dame
Penelope his Wife, *Robert Hoblyn*, an
 Infant, and *Charles Holt*, Esq; and
Martha his Wife, - - - Respondents.

EDWARD Hoblyn of Nanswhidden in the county of Cornwall, Esq; in consideration of a marriage between Robert Hoblyn his son, and Grace, the daughter of John Carew Esq; did, by deed dated the 30th of December, 23 Car. I. settle certain manors and lands in the county of Cornwall, of a very great value, on the said Robert Hoblyn and the heirs male of his body, with divers remainders over.

The marriage took effect; and *Robert Hoblyn* having eight sons and three daughters by the said *Grace*, for all of whom, except the eldest son, no provision was made by the former deed; did, by lease and release, dated the 14th and 15th of *June*, 32 *Car. II.* in consideration of natural love and affection for his younger children, grant and release unto Sir *John Carew* and other trustees, and their heirs, the manor and barton of *Trevedow*, and divers other lands in *Devonshire* and *Cornwall*; all, or the greatest part whereof, he purchased himself, and none of them were comprised in the said settlement of his father; and directed, that the trustees and their heirs should stand seised of the premises, to the use of himself for life, and, after his death, to raise by sale, leasing, or perception of the profits, 4800*l.* for the portions of his younger children, as therein allotted to them; and maintenance for them in the mean time, as therein appointed: Provided, that if *Edward Hoblyn*, his eldest son, who was the appellant *Damaris's* father, should

should die in the life-time of the said *Robert*, without any issue, or if *Edward*, outliving *Robert*, or the eldest son of *Robert*, which should be living at his death, should pay or secure the said portions; then the trustees and their heirs were to stand seised of the premises, to the use of the right heirs male of the said *Robert* for ever. And, after raising and paying the said portions, the trustees and their heirs should stand seised of the fee of such part of the premises as should remain unsold, to the use of the right heirs male of the said *Robert* for ever: With power for *Robert* to revoke, alter, or make void, by deed or will, any use, estate, or provision thereby made or created.

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On the 1st of *June*, 1682, *Robert*, the father, made his will, and appointed *Grace* his wife, and *Edward Hoblyn*, his eldest son, executors and residuary legatees; and thereby devised to *Robert*, his third son, and his heirs, the said manor of *Trevedow*, and all his lands in *Warlegan* and *Cardinham*, he paying to his son *Carew* 400*l.* at his age of 21, and 15*l.* per ann. maintenance in the mean time; and the testator revoked the said settlement, as to the portions of his sons *Robert* and *Carew*, and his daughter *Ann*, which being 1450*l.* reduced the charge on the trust estate to 3350*l.* And he gave to the said *Edward*, his eldest son, all his chattel leases and estates for years in *Tregoose*, *Tregath*, *Andregoath*, and *Nantornan*, in the parishes of *Higher* and *Lower St. Colombe*, and *Little Colen*; provided he paid his brothers and sisters what was provided for them by the said deed, and not revoked by the will.

Afterwards, *Robert*, the father, in consideration of the marriage of his son *Edward* with *Damaris Avent*, the appellant *Damaris's* mother, who was a fortune to him of about 4000*l.* covenanted by articles, dated the 11th of *December*, 1682, that after his death, the said *Edward*, and his heirs, should have all his lands and leases of his tenements and mills, called *Tregoose*, *Higher Tregoose*, and *West Nantornan*, without any condition; and that on payment to *Robert*, the father, of 1500*l.* within two years after the marriage, *Edward*, and his heirs, should have all his lands in *Trevedow*, *Warlegan*, and *Cardinham*, and all his lands called *Tredisack* in *Lower St. Colombe*; and that *Edward* and his executors should have all his leases and terms for years in two parts of *Tredisack*. And the said *Damaris*, the appellant's mother, therein covenanted with the said *Robert*

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Hoblyn, to convey to him and his heirs, all her lands in *Devon*, except *Combe*, upon the terms therein mentioned; and which she afterwards conveyed to him accordingly.

Robert, the father, made no settlement pursuant to these articles, nor was the 1500*l.* ever paid; but, on the 16th of *August*, 1683, *Robert*, the father, made a codicil to his will, and therein declared, that if his son *Edward* should pay to his son *Robert* 600*l.* and to his son *Carew* 700*l.* within one year after his death, and, in the mean time, 20*l.* yearly; then the devises of his lands in *Trevedow*, *Warlegan*, *Cardinham*, and *Tredifack*, and the leases thereof, were to be void; and *Edward* and his heirs were to have the said lands and leases: And he reduced the legacies in his will of 100*l.* each to *Grace* his wife, and to his sons *Francis* and *William*, to 50*l.* each.

On the 6th of *October* following, *Robert*, the father, died; whereupon *Edward*, his eldest son, entered on such part of the trust estate, the uses whereof were not revoked by his father's will, and also upon the chattel estates, by virtue of the will, and enjoyed the same respectively until his death; but he never paid the 600*l.* to his brother *Robert*, or the 700*l.* to his brother *Carew*: Wherefore, *Robert* entered upon the manor of *Trevedow*, and the lands in *Warlegan*, *Cardinham*, and *Tredifack*, according to his said father's will and codicil; and paid the legacies thereby given to the said *Carew* his brother.

In *August*, 1684, *Edward Hoblyn* died intestate, leaving the appellant *Damaris*, his only child and heir at law, an infant about nine months old; whereupon *Richard*, his next brother, entered upon the trust estate, and by deeds of lease and release dated the 1st and 2d of *July*, 1688, executed by the trustees, and reciting the trust deed, and the death of *Edward*, without leaving heirs male of his body; that great part of the portions of the younger children were still unpaid; that the trustees had not taken any of the rents, issues or profits of the premises, or raised any money by leasing or sale thereof; but that such rents, issues and profits had been received by *Edward*, during his life, and afterwards by the said *Richard*, his eldest surviving brother, who was now become the heir male of *Robert*, the father; the trustees, in order to discharge themselves of their trust, in a manner agreeable to the directions of the said *Robert*,

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the father, and in consideration of 3200*l.* paid, or secured to be paid to them, and to be applied in payment of the portions of such of the younger children as remained unpaid, did convey all the trust premisses, not revoked, or otherwise settled by the will and codicil of *Robert*, the father, to the said *Richard Hoblyn* and his heirs.

In 1689, *Richard* died without issue, but made his will, and thereof appointed his brother *Robert* executor; who, taking advantage of the infancy of his niece the appellant *Damaris*, entered and possessed himself of the freehold and chattel estates, and held the same till his death in 1704.

On the death of *Robert*, his son *Francis* entered and possessed, in like manner, till his death in 1711; and after him, the respondent *Robert* his son entered and possessed all the said estates.

As soon as the appellant *Damaris* came of age, she found that what had been raised by fines for leases of the trust estates, together with the yearly profits thereof, and by profits of the mines, had satisfied all the charges laid thereon, both by the settlement and will, and that there was a great overplus due to her, and therefore she entered thereon; but, for want of the deeds, which were in the custody of the respondents, or those under whom they claimed, and by reason of the trust, she could not assert her right at law. For which reason, in Trinity term, 1709, the appellant *Damaris* brought her bill in Chancery for a discovery of the deeds belonging to her, and for an account of what had been raised out of the trust and other estates, and to have the possession thereof, and such other relief as should, in her case, be proper. All proper persons were made parties to this bill, and all the children of old *Robert*, and their representatives, admitted, by their answers, that they had been satisfied their respective portions: But two of the defendants, *Charles Holt* and *Martha* his wife, pretended a right to an annuity of 200*l.* per ann. out of the premisses, under a settlement made by her former husband, the said *Richard Hoblyn*. And the said *Francis Hoblyn*, and after his death the said *Robert* his son, pretended a right to the premisses, as heir male of old *Robert*, or under his will.

On

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On the 28th of *June*, 1723, the cause was heard before Sir *Joseph Jekyl*, Master of the Rolls, who declared and decreed, that the appellant *Damaris* was well entitled to the lands and premises mentioned in old *Robert's* settlement, subject to the charge laid thereon by her said grandfather; and that she was also well entitled to two third parts of the leasehold and personal estates of *Edward* her father, by the statute of distribution; and that the possession of the lands comprised in the deed of old *Robert*, should be delivered to the appellants, together with the deeds of the same estate; his Honour declaring, that it plainly appeared to him, that the said estate had borne its burthen, and that it belonged therefore to the appellant *Damaris*, the heir at law of old *Robert*, and of *Edward*, his eldest son; and that the appellant *Damaris* was entitled to the surplus profits of the said estate, beyond the charge laid thereon; and therefore gave proper directions about the same, as also for a division of the chattel estates, and about the personal estate of *Edward*, the appellant *Damaris's* father.

From this decree, the respondents appealed to the Lord Chancellor *Macclesfield*; and on the 17th day of *July*, 1724, his Lordship was pleased, on hearing the cause, to decree, that the appellant *Damaris* had no right to the lands comprised in old *Robert's* settlement; declaring, that the limitation to the heirs male therein, was good to the male, exclusive of the heirs general; that the conveyance of the trustees to *Richard*, as heir male, was good; that the annuity granted to *Martha* was good; and that the devise to *Edward*, of part of the lands in the codicil, became void, by his non-payment of the 600*l.* and 700*l.* therein mentioned, within one year after the testator's death; and therefore his Lordship decreed, that the bill should be dismissed as to every thing, but the appellant's share of the personal estate of *Edward*, her father.

C. Wearg.

T. Lutwyche.

From this latter decree the appellants appealed; and on their behalf it was contended, that a limitation in a deed to the heirs male, is void in law to take effect for the benefit of any other person than the heir general; and that it always enures to the heir general, the law not allowing any limitation to an heir male, unless he be heir. But if such a limitation in a deed to the heirs male, could in law enure to the males who

who were not heirs, yet even in that case, *Edward*, the appellant *Damaris's* father, was entitled; he being the eldest son and heir male, as well as heir general of old *Robert* his father; and being also living at the death of his father, he answered the description in the settlement; for by the express words and manifest intent of that settlement, no other person was to take the estates, unless *Edward* should die without any issue; whereas he left issue, the appellant *Damaris*. That *Richard*, the second son, having therefore no title to the premises, and the assignment to him from the trustees, being only to do what they themselves ought to have done, namely, to pay the small remaining charges on the trust estate, *Richard* could be in no other condition, than the former trustees were; viz. in trust for the appellant *Damaris*, after satisfaction of those remaining charges: So that his possession was merely that of a tenant at will, or at most as guardian for the appellant *Damaris*, during her infancy; and consequently he could make no title, either at law or in equity, either to his wife *Martha*, or any other person. Besides, *Martha* had notice of the appellant *Damaris's* right; there being express mention in her husband *Richard's* settlement on her, that the lands therein mentioned were the lands of, and purchased by *Robert Hoblyn* his father; and mention was likewise made of *Edward*, as the eldest son of *Robert* the father; and covenants were therein contained against the acts of both of them. But even if this were not so, yet *Martha* had ample security for her annuity of 200*l.* per ann. out of other estates of the *Hoblyns*, of the yearly value of 600*l.* which came to her husband *Richard* by the settlement of *Edward* his grandfather; and to which estates the appellant *Damaris* made no claim. That as to the estates devised to *Edward* by the codicil, no laches were imputable to him for not paying the portions of *Robert* and *Carew*, his brothers, at the time thereby limited for such payment; he dying before that time came, and was therefore prevented from complying with the condition, by the act of God: And the long infancy of the appellant *Damaris* was a sufficient excuse for her, even if the portions had yet remained unsatisfied, but which was not the case. As to the estates of *Tregoose*, *Higher Tregoose*, and *Nantornan*, part of the lands in old *Robert's* settlement, he had a power of revoking the uses thereof; and having by

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articles, on the marriage of his eldest son *Edward*, covenanted absolutely, that the same should be to him and his heirs, the appellant *Damaris*, as the heir of *Edward* her father, had an undoubted right to those lands, and to the rents and profits thereof from his death; and therefore, whoever had received such rents and profits during the 20 years of her infancy, were accountable to her for the same in a Court of Equity, as her trustees. That tho' the appellant *Damaris* was the heir both of *Robert* her grandfather, and of *Edward* her father, who died possessed of the premises, yet she had not the least provision made for her by either of them; and therefore, as being an heir at law, she ought not, unless in a very clear and undoubted case, to be debarred of her right; more especially, as there was so large a provision for the heirs male of the body of *Robert* her grandfather, by the estates settled on them by *Edward* her great grandfather, of about 600*l.* *per ann.* and which the respondent *Robert* was in the quiet possession of. Upon the whole, as the respondent's pretence of claim was contrary to the fixed and established rules of law, contrary to the express words and intent of the settlement, marriage articles, will and codicil of old *Robert*, and against an heir who would otherwise be disinherited, notwithstanding her mother's fortune; it was hoped, that the latter decree, as to the real estate, would be reversed; and the former decree, made by the Master of the Rolls, revived.

J. Willes.

C. Talbot.

On the other side it was insisted, that the manor of *Trevedow*, and the lands in *Cardinham*, *Warlegan* and *Trevifack*, were devised by the will of old *Robert*, to *Robert* his third son and his heirs, who was the respondent *Robert's* grandfather; and that such devise was not revoked or altered, either by the articles or codicil. That in the case of a trust deed, a Court of Equity will consider the intention of the parties, as well as in the case of a will, or articles; that it was plainly the intention of old *Robert Hoblyn*, to continue his estate in the male line of his family; and therefore he had expressly given the redemption of the lands, subject to the portions and maintenance of his younger children, not only to his eldest son *Edward*, but to such eldest son as should be living before the said portions became payable, who should pay or secure the

same

same according to the said trust deed; and which was accordingly done by *Richard*, under whom the respondent *Robert* claimed. That the construction contended for by the appellants, was highly unreasonable; for if that should prevail, though the eldest son of old *Robert* living at the time when the portions became payable, should actually redeem the estate, by paying the portions according to the express words of the proviso, yet he must not keep it; but immediately yield it up to the appellant *Damaris*, as heir general of the family. That there was much less reason for making so strained a construction in her favour, because she had an ample provision besides; she having not only her mother's whole fortune, but likewise two thirds of the personal estate of her father. Besides, such a construction would tend to impeach the title of several purchasers for a valuable consideration, and who had purchased without any notice of the appellant's pretended right; for one part of the trust estate was sold by *Richard*, for raising money to pay the portions charged thereon; and under that title, several leases had been granted, fines levied, and marriage settlements made. And lastly, if the appellants should prevail, all the parties would be involved in an account of profits for above 40 years past, which at such a distance of time, would be attended with great hardships and insuperable difficulties; inasmuch as the persons who were in possession of the premises for the first 25 years after the death of *Edward*, the appellant's father, enjoyed the same without any interruption: And therefore it was hoped, that the last decree would be affirmed, and the appeal dismissed with costs.

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BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree of the Lord Chancellor should be reversed, and the decree of the Master of the Rolls affirmed; with this additional order and direction, that the respondents *Charles Holt* and *Martha* his wife, during their joint lives, and the said *Martha*, in case she survived her said husband, should have, take and enjoy, during the natural life of the said *Martha*, the annuity or rent charge of 200*l.* per ann. according to the form and effect of an indenture bearing date the 23d of *October*, 1693; and, that the Court of Chancery should cause an inquiry to be made into the value of the lands subject to the said annuity;

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reversed.
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annuity; and that if the said annuitants, or either of them, should levy, receive, or take any part of the said annuity out of the lands decreed to the appellant *Damaris*, the said *Damaris*, her heirs or assigns, should be reimbursed and repaid the same, out of the other lands, subject by the said deed, to the payment of the said annuity or rent-charge; and that the Court of Chancery should give such directions, in pursuance of this judgment, as should be just.

Case 4. *Patrick Lattin and Michael Moore,* Appellants.

George Robinson and Ann his Wife, } Respondents.
and *William Court,* -

12th March, 1724.

WILLIAM Alcock, of *Dublin*, Esq; being seised of a considerable real estate of the yearly value of 1000*l.* and also possessed of a personal estate of about the value of 50,000*l.* on the 12th of *April*, 1717, made his will; and thereby devised part of his real estate, to the value of 300*l.* per ann. to *William Alcock*, of *Waterford*; and bequeathed several legacies to divers persons, and in particular to the appellants and others his executors, 100*l.* each, to be executors, besides several other considerable legacies given to them, their wives and children, in all to the amount of 7000*l.* or 8000*l.* but made no devise or disposition of the residue of his real or personal estate; and of his said will appointed the said *William Alcock*, a protestant, the appellants *Moore* and *Lattin*, and *Richard Leigh*, papists, executors; and soon after dying without issue, the executors proved the will in common form.

The testator had only one brother of the half blood, *Thomas Alcock*, and two sisters of the whole blood, namely, *Ann* and *Elizabeth*; *Ann* married *Thomas Vernon*, of *Tunbridge* in *Kent*, and both she and her husband died before the testator, leaving issue the respondent *Ann Robinson*. *Elizabeth*, the other of the testator's sisters, married *William Court*, and had issue by him the respondent *William Court*, her eldest son, and four other children;

children; and both *Court* and his wife also dying before the testator, the respondents *Ann Robinson* and *William Court*, as his heirs at law, became entitled to his real estate, not devised by the will. And the respondent *Ann* became also entitled to one third of the residue of the personal estate, undisposed of; and the respondent *William Court* became likewise entitled to one fifth of another third part of such residue, according to the statute of distributions. And therefore, the respondents applied to the appellants and the other executors, to deliver up to them the deeds and writings relating to the testator's real estate, and also to have a distribution of the personal estate, undisposed of by his will.

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These demands not being complied with, the respondents, in *Michaelmas* term, 1718, exhibited their bill in the Court of Exchequer in *Ireland*, against the appellants and the other executors, praying a discovery of the testator's real and personal estate, and to be relieved according to the nature of their case.

The appellants and the other executors put in four several answers to this bill, and thereby they confessed assets to the amount of 10,000*l.* and upwards, and set out a schedule of debts and legacies paid by them, to the amount of 4600*l.* and upwards; and they discovered, that the testator died seised of several lots of Ground on *George's Quay*, and *Mercer's Dock* in *Dublin*, by virtue of a lease for three lives renewable for ever; which, in their first answer, they swore was only a mortgage for years to him.

The appellants being of the popish persuasion, and, as such, disabled by several statutes made in *Ireland* to prevent the further growth of popery, from making any purchase of lands of inheritance; in order to evade those laws, prevailed upon the testator in his life-time, to act as a trustee for them in the purchase of several lands; and, particularly for the appellant *Lattin*, in the purchase of the lands of *Athgarett*, with its several denominations, in the county of *Kildare*, from the Lord *Fitzbarding*, in the year 1712, in consideration of 1360*l.* And, to secure these lands to the appellant *Lattin*, so as that the same should not be liable to a discovery, the testator, on the 25th of *June*, 1713, entered into a statute staple to the



appellant *Lattin* for 2500*l*. And to secure another purchase made by the testator, in trust for him, of the lands of *Dowdingstown* and *Herbertstown*, and their great tythes, and of several other lands in the said county of *Kildare*, the testator, on the 28th of *November* following, entered into another statute staple to the said appellant for 6000*l*. And also to secure to the appellant *Moore*, a purchase made by the testator of certain lands in the county of *Meath*, and a house in the town of *Drogheda*; he, on the 7th of *November*, 1715, entered into a statute staple to the appellant *Moore* for 1500*l*.

The appellants having thus discovered, that the lands on *George's Quay* were held by a lease for three lives, and the respondents being therefore entitled thereto as special occupants; they applied to the Court of Exchequer, to have the lease brought into Court, for the further security of their title; and the Court ordered the same accordingly. Whereupon, the appellant *Lattin*, apprehending that the respondents might be decreed to those lands, and that he would soon be turned out of possession; thought proper, in *April*, 1721, to get the lands extended, under colour of the said statute staple for 6000*l*. and a *liberate* being thereupon directed to the sheriff of *Dublin*, the appellant *Lattin* was, in pursuance thereof, put into possession of the said lands.

The respondents thereupon exhibited a supplemental bill, charging, that the testator had made several purchases of lands in the counties of *Kildare* and *Meath*, in trust for the appellants, who were papists; and that the said statutes staple were entered into by him, to the appellants, in order to prevent those purchases from being discovered, and as a collateral security to assure the same: This bill also charged, that the appellants, in their former answers to the original bill, had omitted to confess a large sum of money due on a judgment, obtained by the testator against *Thomas Dillon*, Esq; and therefore prayed a discovery of all these matters, and to be relieved on this and their former bill, as one and the same case.

The appellants answered this supplemental bill; and as to the purchases being made by the testator, in trust for them, they referred to their answer put in to a bill of discovery, brought

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brought against them by one *Pearson* on the popery acts, as a protestant discoverer; and the appellant *Maore* said, that the statute staple entered into by the testator to him for 1500*l.* was for a valuable consideration.

The respondents were entire strangers to the testator's affairs, having resided in *England* till after his death; and whatever discoveries they made of his effects or dealings, were only collected from the answers of the appellants, and from common report; for all the deeds, evidences and writings, which might be of service to the respondents, in clearing up or making out their title to the real and personal estate of the testator, undisposed of by his will, were in the custody of the appellants, as his executors; and therefore the respondents made search in the book of the Recognisor of the Court of Chancery in *Ireland*, and found, that on the 9th of *July*, 1713, an entry was made in that book, of one statute staple from the testator to the appellant *Lattin* for 2500*l.* which was acknowledged the 26th of *June* preceding; and on the back of the leaf whereon the said statute staple was so entered, a deed of defeazance was also entered, dated the said 26th of *June*, 1713, and was mentioned to be made between the appellant *Lattin* and the testator, wherein the said statute staple was recited, and by which defeazance the appellant *Lattin* did covenant, that he would extend and take in execution the town and lands of *Athgarett*, with its several denominations in the county of *Kildare*, and no other estate of the testator, his heirs, executors, administrators, or assigns; and would continue the same only in extent, until he, his executors, administrators and assigns, were paid the principal and interest due on the said statute staple; and he further covenanted, that the same should not charge or affect the person of the testator: And this deed of defeazance appeared, by the entry in the said book of recognizances, to have been entered on the same day the statute staple was entered. On further search in the same book, the respondents found, that on the 31st of *March*, 1713, an entry was therein made of another statute staple from the testator to the appellant *Lattin*, for 6000*l.* which was acknowledged the 28th of *November*, in the same year; and on the next adjoining leaf a defeazance was also entered, dated the said 28th of *November*, 1713, made between

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between the appellant *Lattin* and the testator, reciting the said statute staple, by which deed the appellant *Lattin* covenanted, that he would extend and take in execution the town and lands of *Dowdingstown* and *Herbertstown*, and their great tythes, and several other lands therein mentioned, and no other estate of the testator, his heirs, executors, administrators, or assigns; and would continue the same only in extent, until he, his executors, administrators and assigns, were paid the principal and interest due on the said statute staple: And he further covenanted, that the same should not charge or affect the person of the testator. And this deed of defeazance appeared to have been entered on the same day, the statute staple was entered.

The appellant *Lattin* having, by virtue of the last mentioned statute staple, extended the lot of ground on *George's Quay*, and the respondents not having any intimation that there was any defeazance against the same, until the search was made in the recognizance book as aforesaid; and the original defeazances being amongst the testator's other deeds and papers in the custody of the appellants as his executors; the respondents therefore, in *December*, 1722, exhibited a bill in the Court of Chancery in *Ireland* against the appellants, setting forth the several proceedings in the Court of Exchequer, and insisting on their right to the said lot of ground on *George's Quay*, as being heirs at law of the said testator; and stating also, that the appellant *Lattin* had extended the same, by virtue of the statute staple of the 28th of *November*, 1713, notwithstanding such defeazance as aforesaid; and that the said several statutes were so entered into by the testator, only to screen the purchases made by him, in trust for the appellants; this bill therefore prayed, that the said statutes staple might be set aside, and that the respondents might be relieved in the premisses.

The appellants having answered this last bill, and therein referred to their several answers in the Court of Exchequer, praying that the same might be taken as part of their answers to the bill in Chancery; the cause was heard on the 21st of *May*, 1724, and it appearing fully in proof, by the evidence of one

Shippy,

Shippy, who was clerk to the testator, that he was witness to a deed of defeazance dated the 28th of *November*, 1713, and saw the same executed by the appellant *Lattin* to the testator; that he believed the paper writing produced to him on his examination, was a true copy of such defeasance, and that he had examined the said paper, with the entry of the defeazance in the book in the Recognizance Office: And it also appearing by the evidence of *Walter Burton*, Esq; who was, in the year 1713, clerk in that office, that the paper so proved by *Shippy* to be a copy of the defeazance he saw executed by the appellant *Lattin* to the testator, was a true copy of the entry in the recognizance book, of the 28th of *November*, 1713; that two several statutes staple, and two defeazances, were brought to him to be entered in the office, and that he entered the same as appeared in the said book: And it also appearing by many concurring circumstances, that the defeazances so entered, were executed by the appellant *Lattin* to the testator; the Court decreed an injunction, to put the respondents into possession of the said lots of ground on *George's Quay* and *Mercer's Dock*; and that a perpetual injunction should issue, to stay the appellant *Lattin's* proceedings upon the statutes staple entered into by the testator to him, as to the lands which the respondents claimed as heirs at law of the testator: And it was referred to a Master, to state the accounts of the profits of the said lots of ground, from the time of the extent laid thereon by the appellant *Lattin*, and also to take an account of the personal estate of the testator; and that the appellant *Moore* should stop executing any extent, upon the statute staple entered into by the testator to him, until the return of the Master's report; and that in case it should appear there were assets sufficient of the testator, to pay what was due on the appellant *Moore's* statute staple, the same should be paid thereout in ease of the real estate which the heirs at law of the testator were entitled to: And the Court decreed costs against the appellants *Lattin* and *Moore*; but the costs against *Moore* were to be paid out of assets.

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From this decree the present appeal was brought; and on behalf of the appellants it was insisted, that there was not the least proof made of the appellant *Lattin's* executing any such deed as that of the 25th of *June*, 1713, importing a defeazance to the statute staple for 2500*l.*; for the persons supposed

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supposed to be witnesses thereto, swore they knew nothing of the execution of it. That the evidence offered to support the other pretended defeazance of the 28th of November, 1713, was so loose and uncertain, that no credit ought to be given to it; and the person supposed to be a subscribing witness to that defeazance, being examined for the respondents, had on his oath denied, that he ever knew or heard of such a deed. That the entries made in the book of the clerk of the recognizances in Chancery, ought not to be admitted as evidence of any such deeds, that office being in no sort appointed by any law or custom, to make or receive entries of any statutes staple, or defeazances of any kind; nor hath there been any entries of deeds, usually, or at any time made in the said office. That there was the less reason for making such entries in the present case, because there was no proof made of the execution of the deeds; nor was it attempted to be shewn, when, or by whose order such entries were made, or who paid for the same. That there was no sort of evidence of the appellant *Moore's* having executed any defeazance, nor even an entry thereof in any book whatsoever; neither did it appear, that he had sued out any extent or *liberate* upon his statute staple, but he was brought into Court by the respondents without any grounds; and yet costs were decreed to be paid to them as against him, out of the testator's assets. That if such entries, not warranted by any law, usage, or custom, should be admitted as evidence to establish deeds, it would be of very dangerous consequence; render all property precarious, and introduce and encourage perjury and confusion: And therefore it was hoped, that the decree would be reversed, and the respondents bill dismissed with costs.

P. Yorke.

C. Talbot.

On the other side it was said, that it appeared by the evidence of Mr. *Shippy*, the testator's clerk, that a defeazance was executed by the appellant *Lattin*, to the testator, of the statute staple for 6000*l.* dated the 28th of November, 1713, whereby certain lands in the county of *Kildare*, were only to be extended, on account of that statute staple; and therefore the appellant *Lattin* had no right, under any pretence whatever, to extend any other estate of the testator's. That it appeared in proof in the cause, that the defeazances on the statutes staple of the 26th of June, and 28th of November, 1713, were brought with the statutes to be entered together in the Recognizance book

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book of the Court of Chancery; and it also appeared, that these defeazances were entered in that book; next to their respective statutes staple, on the very days when those statutes were entered; it was therefore reasonable to believe, that the same was done by the appellant *Lattin*, or some person by his authority, since there was no other entry of the said statute staple in the book: And it was observable, that it was upon the entry of the statute for 6000*l.* next to which the defeazance was entered, that the appellant *Lattin* sued out his extent, and by virtue thereof got possession of the lots of ground. That according to the schedules which the appellants had annexed to their answers in the Court of Exchequer, the personal estate of the testator, which they had possessed themselves of, was not sufficient to pay the debts due on these statutes staple; and yet, by the same answers, they confessed to have paid about 1800*l.* in debts of an inferior nature, and legacies to the amount of 3000*l.* and also to have divided among themselves and the two other executors, all the testator's plate, household furniture and jewels; which it is not to be imagined they would have done, had the statutes staple been in force, or the debts due thereon then subsisting. That neither of the appellants in their several answers in the Exchequer, ever once thought fit to mention or insist on their demands under these statutes staple, altho' that bill prayed to have the *residuum* of the testator's real and personal estate undisposed of by his will: And tho' the testator died in 1717, yet the appellant *Lattin* did not think fit to set up his statute staple till the year 1721, which was four years afterwards, and when he apprehended the respondents were likely to recover the lots of ground on *George's Quay*. That the *liberate* sued out on the statute for 6000*l.* was marked for the sum of 9610*l.* and which addition of 3610*l.* could only be for interest accrued due in the testator's life-time, as well as after his death; whereas it was not probable, that the testator, considering his great circumstances, would suffer such an arrear of interest to accrue, or that the appellant *Lattin*, considering his circumstances, could have permitted the same to remain unpaid: And as there was no proof that he ever advanced a single shilling of the several sums for which the statutes staple were acknowledged, or ever demanded or received any interest thereof, the inference was strong, that they were only given to secure the fraudulent purchases above mentioned. And therefore it was hoped,

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P. 446.

hoped, that the decree would be affirmed, and the appeal dismissed with costs.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of, affirmed; and that the appellants should pay to the respondents, the sum of 60*l.* for their costs in respect of the said appeal: And it was further ORDERED, that nothing in this judgment contained, should be taken to be binding upon the personal estate of the testator *William Alcock*, with relation to the several statutes in the proceedings mentioned, or any of them; but every person interested in, or claiming title to the said personal estate, should be at liberty to disprove the said statutes, or any of them, either in this present suit, or in the Court of Exchequer, or in any other manner, as they should be advised.

Case 5.

Thomas Catesby Pagett, Esq; commonly
called *Lord Pagett*, and *Lady Elizabeth*, his Wife, } Appellants.

The most Noble *Scroope*, Duke of } Respondents.
Bridgewater, and *John Pierce*, Gent.

17th March, 1724.

Viner, vol. 8.
p. 280. ca. 24.
2 Eq. ab. 327.
ca. 40.

JANE, Countess Dowager of *Bridgewater*, mother of the appellant *Lady Elizabeth*, was possessed of a considerable personal estate; consisting, amongst other things, of several shares in *Bank* stock, *South-sea* stock, and *India* stock, and also of several annuities payable at the Exchequer, which the Countess had at several times purchased in the name of the respondent *Pierce*, and for which he had given to her several notes or declarations of trust; viz. One dated the 13th of *March*, 1702, whereby he promised to transfer to the Countess 300*l.* *Bank* stock, at demand, and to be accountable for all dividends thereon, until such transfer: One other dated the 23d of *June*, 1705, whereby he promised to assign to her, or her

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her order, an annuity of 50*l.* *per ann.* issuing out of the Exchequer for 99 years: Another annuity of 50*l.* *per ann.* bought of *William Lancaster*; and another like annuity of 25*l.* *per ann.* One other note dated the 18th of *March*, 1714, whereby he promised to transfer to the Countess, or her order, 2000*l.* *South-sea* stock, 500*l.* *Bank* stock, and 500*l.* *India* stock; and to be accountable for all dividends until such transfer.

On the back of which last note, was indorsed a memorandum, signed by the Countess, that the respondent *Pierce* had transferred to Mr. *Charles Egerton* 500*l.* part of the 2000*l.* *South-sea* stock.

The Countess having a power by the will of *John*, Earl of *Bridgewater*, her husband, to distribute a considerable part of his real and personal estate amongst her children; did, by deeds executed in her life-time, make a distribution thereof, and thereby limited and appointed 5000*l.* to the appellant Lady *Elizabeth*, over and above another sum of 5000*l.* which she was entitled to for her portion, under a settlement made by the Earl in his life-time. And as a further provision for her, the Countess also settled and conveyed her house at *St. James's*, of the clear yearly value of 200*l.* to the said appellant Lady *Elizabeth*, for her life, after the Countess's death.

The Countess was, for several years before her death, possessed of a strong box with some drawers in it, where she usually kept her jewels, and other things of greatest value, and which generally stood upon a table in her bed-chamber; but being of small dimensions, and easily removed, she, some years before her death, caused a frame or table to be made, to fix this strong box upon, and secure the same with screws; and, for the conveniency of having other repositories in her bed-chamber, she ordered several drawers to be made in such frame or table, which were distinct and separate from the strong box, kept under different locks and keys, and made use of for different purposes; and when she had occasion to send her servants thereto, she generally described them by *the drawers under my strong box*. — The Countess was also possessed of some cabinets and *India* chests, which stood in other rooms of her house at *St. James's*.

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On the 10th of *August*, 1711, the Countess made her will, and thereby gave to her son *William Egerton* 1200*l.* to her son *Henry* 1000*l.* to her son *Charles* 800*l.* and to her daughter *Lady Elizabeth Egerton*, (the appellant) 2000*l.* to be paid within a year after her death; she also gave to the *Lady Elizabeth* her gold cup, and all her jewels, and then followed a bequest in these words; viz. “I do give my said daughter, the “ *Lady Elizabeth Egerton*, my gold pouling watch and seals at “ it, and my gold tvey, my strong box, and whatsoever is in “ it; all my chests and cabinets, and whatsoever is in them, “ not otherwise disposed of by this my will.” The testatrix also gave to the *Lady Elizabeth* all the furniture in her best bed-chamber at *London*, and the pictures and furniture in her best closet, and all her china, dressing and chamber plate; and the rest of her plate and household linen, she gave to be equally divided between her younger sons *William*, *Henry* and *Charles*, and her daughter the *Lady Elizabeth*; and, after giving some other specific and pecuniary legacies, she gave the residue of her real and personal estate to her eldest son the respondent the Duke, his heirs, executors, and assigns, and made him sole executor of her will.

The Countess afterwards made two codicils to her will, and thereby gave several other specific legacies to the *Lady Elizabeth*; and on the 23d of *May*, 1716, died, possessed of a very great personal estate, besides what she gave away in legacies, which the Duke, as executor, possessed himself of.

The appellant *Lady Elizabeth*, being thus entitled to the strong box, chests and cabinets, and whatsoever was in them, at the Countess's death, soon afterwards applied to the respondent the Duke, to have them delivered to her; but he insisting, that, as executor, he had a right to see what was in them, required the same to be opened, which was accordingly done; and in the strong box, or the drawers thereof, were found the said several notes or declarations of the respondent *Pierce*, together with a Bank note and three exchequer notes of 100*l.* each, and some gold and silver coin. Upon which, the Duke was pleased to cause a memorandum to be taken of the said notes or declarations, and after having taken some time to consider and advise upon the same, permitted the strong box and the drawers affixed thereto, together with the said notes or declarations and the other notes and things found therein, to be delivered to the appellant the *Lady Elizabeth*.

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In consequence whereof, she soon afterwards applied to the respondent *Pierce*, to transfer and assign the said stocks and annuities and the money due thereon, to her, or as she should direct; but he refused so to do. And therefore, in *Michaelmas* term, 1717, the appellant Lady *Elizabeth*, brought her bill in the Court of Chancery against the respondents, to compel the respondent *Pierce* to transfer and assign the said stocks and annuities to her, and to account for and pay her all dividends from time to time received thereon.

To this bill, the respondents put in their several answers; and the respondent, the Duke, insisted on his right to the notes or declarations of trust, and to all the stocks, annuities, dividends and monies, arising therefrom, as he was the residuary legatee of the Countess's will. — The appellants afterwards intermarried, and the proceedings in the cause being thereupon revived; the respondent the Duke, in *Trinity* term following, brought his cross bill against the appellants and the respondent *Pierce*, claiming the said stocks and annuities, and the dividends and monies due thereon; and praying, that *Pierce* might transfer, assign and pay the same over to him, and also that the appellants might discover what monies, or other things were found in the drawers affixed to the strong box, and that the same might be paid and delivered to him.

Both causes being at issue, were heard on the 9th of *December*, 1723, before the Lord Chancellor *Macclesfield*; who was pleased to decree, that the original bill exhibited by the appellant the Lady *Pagett* before her marriage, and afterwards revived, should stand dismissed, but without costs, except as to the respondent *Pierce*, who was to have his costs to be taxed. And in the cross cause, it was ordered and decreed, that the appellants should deliver to the respondent the Duke, the said notes or declarations of trust; and should come to an account before the Master for the *Bank* notes, exchequer bills, monies and other effects, which were in the drawers in the frame or table upon which the strong box stood; (except the policy of insurance therein found) as also for the things and effects in a black deal press, at the time of the death of the said Countess of *Bridgewater*, and which had come to the hands or possession of the appellants, or either of them; for the better discovery whereof

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whereof they were to be examined on interrogatories, as the Master should direct. And it was further ordered, that the appellants should pay what, upon such account, should appear to be due from them to the respondent the Duke, at such time and place, as the Master should appoint. And as to the said frame or table, and the drawers therein, the same being then in the possession of the appellants, they were at liberty to keep the same, the respondent the Duke being present in Court, and consenting thereto. And as between the respondents, it was farther ordered, that the respondent *Pierce* should transfer or assign to the respondent the Duke, or to whom he should appoint, the several stocks and annuities standing in his name, and account before the Master for what he had received, on account of the annuities, or for the dividends upon the stocks, and pay the same to the respondent the Duke, at such time and place as the Master should appoint. And it was ordered, that the Master should tax the appellants and respondent *Pierce*, their costs in the cross cause, to the time of the hearing, which were to be paid out of the Countess of *Bridgewater's* estate. But the consideration of the future costs, was reserved till after the Master's report.

C. Wearg.

W. Peere
Williams.

The appellants apprehending themselves aggrieved by this decree, appealed from it; and on their behalf it was argued, that the decree was founded upon a presumption, that the frame or table, and the drawers therein, was no part of the strong box; whereas, it was in proof in the causes, that this frame or table and drawers, were always looked upon as part of the strong box, and the whole as one piece of work, being fixed together by screws, so as not to be separated without first unlocking the strong box; that the same were so fixed together, from the time of making the said frame or table, which was about two years before the date of the Countess's will in 1711, and continued so till the time of her death; and that the Countess, when she had at any time occasion to mention the drawers in the said frame or table, always called them the drawers of her strong box. That it also appeared by the evidence of the respondent *Pierce*, who was examined as a witness, as well for the respondent the Duke, as the appellants, that the Countess, when in health, usually locked and unlocked this strong box and drawers herself, but when confined to her bed, she trusted her women to unlock the same; and that the

strong

strong box and frame constantly stood in a corner of the bed-chamber, in view of the Countess, either when in bed, or confined to her chair by the fire. From whence it was reasonably to be presumed, that the notes, or declarations of trust, and also the *Bank* and *Exchequer* notes, were deposited in the drawers of the said frame by the Countess herself; and that she, having both box and frame so fixed together constantly before her, must have it in her view and intention, by the devise of her strong box, to pass the frame, table and drawers therein, to the appellant Lady *Pagett*, as well as the said strong box. That if any doubt remained, whether such was her intention, yet having devised all her chests and cabinets, and whatsoever was in them, to the appellant Lady *Pagett*, the same ought to be taken as an extensive devise; and as the Duke's own witnesses had described this frame or table, with the drawers therein, to be a chest of drawers, or a nest of drawers; it was presumed to be, nevertheless, a chest, though it had drawers in it, and therefore did well pass to the appellant Lady *Pagett*; and the rather, because neither the said frame, table, or drawers therein, were otherwise disposed of by the will. That altho' the notes, or declarations of trust, might be looked upon as choses in action, yet it could not be doubted, but that they might be bequeathed by express words; and the bequest of whatsoever was in her strong box, chests and cabinets, was the same, as if every particular and individual thing therein had been expressly bequeathed. That these notes, or declarations of trust, being deposited by the Countess, with the *Bank* and *Exchequer* notes, and the will and devise to the appellant Lady *Pagett*, being of the Countess's own penning; she evidently intended to pass all the said notes, and all her interest and property from thence arising, to the appellant; and this devise ought the rather to have such a construction in a Court of Equity, as it regarded only a personalty, and was in favour of a child, for whom the Countess ever expressed the greatest affection.

On the other side it was contended, that the fixing of the strong box by screws to the frame or table, did not make the same a part of the strong box; nor could what was in the drawers of the frame, be said to be in the strong box. That this frame or table, and the drawers therein, were not in the

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nature of a strong box, nor any way proper to keep things of value in, or such as are commonly kept in a strong box, the locks of the drawers being slight and ordinary, and the back part of the frame made of thin slit boards. That the Countess constantly distinguished the drawers in the frame from the strong box, by the appellation of *the drawers under her strong box*; and she accordingly made use of them for different purposes, keeping loose and disregarded papers in some, in others her wearing laces and things of little value, and in another of them her running cash, for cloaths, charity and other daily uses. That this frame or table, separated from the strong box, was not in the nature of a chest or cabinet; and tho' the appellants, by their answer to the cross bill, had distinguished and ascertained what chests and cabinets they claimed; yet they had not included the said frame or table, and drawers in it, under either of those denominations. That it was not pretended, that Mr. *Pierce's* notes or declarations of trust were ever kept in the strong box, either at the time when the Countess made her will, or at any other time; besides, one of them bore date above two years after the will: And even if they had been in the box at her death, yet the annuities and stocks would not have passed to the appellant Lady *Pagett*, by the general devise of the strong box, and whatsoever was in it; since neither the annuities or the stocks could, with any propriety, be said to be in the strong box. But this general devise should rather be intended of such things, as were of the nature of those expressly devised, before the devise of the strong box. That the Countess made a very bountiful provision for the appellant Lady *Pagett*, far exceeding what she did for her other younger children; and therefore there was no occasion to augment it, by a strained construction to pass the notes and effects found in the drawers of the frame or table, by the general devise of the strong box, chests and cabinets, and whatsoever was in them.

DECREE
reversed by
agreement.
Jour. vol. 22.
p. 449, 451.

AFTER hearing counsel on this appeal, on *Monday* the 15th of *March*, 1724, a debate arose; but was adjourned to the next day, and the Lords were ordered to be summoned. On the 16th, the House was informed, that there was an agreement between the parties; whereupon it was ORDERED, that the debate should be further adjourned till the morrow at twelve o'clock, and the Lords to be summoned; and that one counsel of a side should then attend. Accordingly, on the next day, the

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the counsel being called in, Mr. Solicitor-general on the part of the appellants, acquainted the House, "That the parties were come to an agreement; and that the same was put into writing and signed, as well by the Duke of *Bridgewater*, as the Lord *Pagett*." And Mr. Attorney-general, on the part of the Duke, likewise acquainting the House, that his Grace did consent to, and had signed the said written agreement; the same was delivered in at the bar, and being read by the clerk, the following order was made.

"After consideration had in relation to this matter, it is ORDERED and ADJUDGED, by the Lords Spiritual and Temporal in Parliament assembled, according to the said written agreement, That the decree of the Court of Chancery, made the 9th day of *December*, 1723, complained of in the appeal of the said Lord *Pagett* and *Elizabeth Lady Pagett* his wife, be, and is hereby reversed; and that the said appellants shall have and enjoy, to and for their own use and benefit, the strong box mentioned in the last will of the late Countess of *Bridgewater*, and the chest of drawers to which the said strong box was affixed, and the 300*l.* *Bank* stock, mentioned in a note, or declaration of trust, dated the 13th day of *March*, 1702, under the hand of the respondent *Pierce*, whereby he promised to transfer to the said Countess 300*l.* *Bank* stock at demand, and to be accountable for all dividends thereon, until such transfer; and also, that the said appellants shall have and enjoy, to and for their own use and benefit, the several annuities issuing out of the Exchequer for the residue of 99 years, which are mentioned or described in one other note, or declaration of trust, dated the 22d day of *June*, 1705, under the hand of the said *Pierce*, and all dividends and yearly payments, which became due or payable at any time since the decease of the said late Countess, for, or in respect of the said 300*l.* *Bank* stock, or of the said annuities, or any or either of them; which said several notes, or declarations of trust, were found in the said drawers, or one of them, at the opening thereof, soon after the decease of the said Countess; and also, that the said appellants shall retain, have and enjoy, to and for their own use and benefit, one *Bank* note for 200*l.* and three
" Exchequer

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“ Exchequer notes for 100*l.* each, and all the gold and silver
 “ which were found in any of the drawers of the said chest,
 “ at the time of the opening thereof as aforesaid; and that
 “ the respondents, or one of them, at the request and at the
 “ charge of the said appellants, shall transfer and assign to
 “ the said appellants, the said 300*l.* *Bank* stock, and the
 “ said several annuities issuing out of the Exchequer, and
 “ deliver to the said appellants the several tallies and orders
 “ relating thereto: And that the said respondent the Duke
 “ of *Bridgewater* shall have and enjoy, to his own proper use
 “ and benefit, as part of the *residuum* of the personal estate
 “ of the said Countess, the several stocks specified in one other
 “ note, or declaration of trust, dated the 18th day of *March*,
 “ 1714, and signed by the said *Pierce*, which was also found
 “ in one of the said drawers, at the opening thereof as afore-
 “ said, (except so much of the *South-sea* stock of 2000*l.* therein
 “ mentioned, as appears by an indorsement signed by the said
 “ Countess, on the said note, to have been transferred by the
 “ respondent *Pierce*, by her order) together with all dividends,
 “ for or in respect of the said several stocks, mentioned in the
 “ said note of the 18th of *March*, 1714, which became due
 “ or payable since the death of the said Countess; and that
 “ the said last mentioned note, or declaration of trust, be
 “ delivered by the appellants to the respondent the Duke of
 “ *Bridgewater*: And that the respondent *Pierce* shall have his
 “ costs in both the said causes, to be taxed by the said Court,
 “ and be paid to him out of the *residuum* of the personal estate
 “ of the said Countess; but as between the appellants and the
 “ respondent the Duke of *Bridgewater*, there is to be no costs
 “ on either side: And that if any question shall hereafter arise
 “ between the said parties, touching the matters aforesaid, this
 “ judgment shall be carried into execution by the said Court
 “ of Chancery.”

Mary Young, Widow of *Bartholomew Young*, Esq; her late Husband, and also Widow and Legatee of *Thomas Sutton*, her former Husband; and *Arthur Young*, Clerk, Executor of the said *Bartholomew Young*, } Case 6.
Appellants.

William Burdett and *Frances* his Wife, late *Frances Roberts*, one of the children of *George Roberts*, and one of the grandchildren of the said *Thomas Sutton*, and *John Sutton*, residuary Legatee of the said *Thomas Sutton*, } Respondents.

20th March, 1724.

THOMAS Sutton by his will, dated the 22d of April, 1714, devised to the appellant *Mary*, his then wife, all his real estate in the county of *Suffolk*, with the *Chequer Inn*, in the parish of *St. Andrew, Holborn*, for her natural life; and after her death, to trustees, in trust to be applied to charitable uses; subject to the payment of two annuities, of 20*l.* and 30*l.* per ann. to a sister and nephew of the testator's. And as to his personal estate, he bequeathed the same in the words following, viz. "Item, I give and bequeath unto my said loving wife, all my personal estate, of what nature or kind the same be, to her sole use, during her natural life. Item, "I give and bequeath unto my grandson *Thomas Roberts*, and to my granddaughter *Frances Roberts*, children of my son in law *Mr. George Roberts*, late of *Goodman's Fields, Gent.* the sum of 1000*l.* a-piece, if they attain the age of 21, or shall be married; but in case they die before that age, then I give the same to my said trustees, to be applied to the like uses, as the estates herein before devised to them are directed. Item, I give and bequeath unto my said granddaughter *Frances Roberts*, after my wife's decease, all my household goods, plate and linen whatsoever. All the residue of my estate, of what nature or kind soever, not hereby by me
Vol. III. N " disposed

9 Mod. 93.
Viner, vol. 8.
p. 284. ca. 21.
403. ca. 32.
418. ca. 9.
2 Eq. ca. ab.
557. ca. 23.
560. ca. 5.

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“disposed of, I give and bequeath unto my nephew *John Sutton*, after the death of my wife.”

On the 5th of November, 1717, the testator made a codicil to his will; ratifying and confirming all the devises and bequests thereby given to his wife, and revoking all the devises and bequests therein contained relating to charities; and disposed of his lands and tenements, after the death of his wife, in another manner; and made his wife *Mary* sole executrix of his said will, and soon after died without issue.

The appellant *Mary* proved her said husband's will and codicil, and some time afterwards intermarried with *Bartholomew Young*.

The respondent *Frances Roberts*, having attained her age of 21, and being married to the respondent *William Burdett*, they exhibited their bill in Chancery, in *Michaelmas* term, 1720, against the appellant *Mary* and her said husband *Bartholomew Young*, and the said *John Sutton*; to have an account of the personal estate of the testator, which they charged amounted to 6000*l.* and upwards, and likewise of the household goods, plate and linen, and to be paid the legacy of 1000*l.* and interest from the time of their intermarriage, or of the respondent *Frances* attaining her said age of 21; or, in case the respondents were not entitled to the said 1000*l.* till after the death of the appellant *Mary*, then that the appellant *Mary* and her said husband might be obliged to give security for payment thereof, and for the delivery of the said household goods, plate and linen, after the appellant *Mary's* death.

The appellant *Mary* and her said husband, by their answer to this bill, and a schedule thereto, set out the testator's personal estate, whereby it appeared not to exceed 1700*l.* over and above debts, legacies and funeral expenses; and they insisted, that the respondents were not entitled to the 1000*l.* till after the death of the appellant *Mary*; and how far they might be entitled to the same, even then, they submitted to the Court; in regard they had then lately discovered, that the said *Thomas Sutton* was a freeman of the city of *London*, and as such, had no more to dispose of, than a moiety of his personal estate; and that the appellant *Mary* his widow was entitled, by the custom of *London*, to the other moiety thereof, as also

to her *paraphernalia* and widow's chamber. And the said *Bartholomew Young* also set forth, that the said *Thomas Roberts*, the respondent *Frances's* brother, on his attaining his age of 21, being satisfied he had no title to his 1000*l.* legacy, at least till after the appellant *Mary's* decease, had made him, the said *Bartholomew Young*, an allowance for the immediate payment thereof; and that before he had notice of the said *Thomas Sutton's* being a freeman of *London*, and on a presumption that he had power to dispose of his personal estate by will, the said *Bartholomew Young*, about the 10th of *July*, 1719, had given security to pay the respondent her 1000*l.* legacy, when the same should become payable by the will.

Issue being joined in the cause, the appellant *Mary* and her said husband *Bartholomew* procured an attested copy out of the Chamberlain of *London's* book, for entering the names of persons made free of the said city, of an entry bearing date the 10th of *January*, 1677, to prove the freedom of the said *Thomas Sutton*, of the city of *London*.

On the 3d of *November*, 1722, the cause came on to be heard at *Westminster*, before Mr. Baron *Price*, in the absence of the Lord Chancellor; at which time, the appellant *Mary* produced, and read the attested copy of the said entry, to prove the freedom of the said *Thomas Sutton*: But Mr. Baron *Price* was of opinion, that the said entry was not a sufficient evidence to prove the said *Thomas Sutton* to have been a freeman of the city of *London*, without proving at the same time, the identity of the person, and that the said *Thomas Sutton* the testator, was the same *Thomas Sutton*, who was meant and intended by the said entry; and therefore made no decree in relation thereto: But as to the other matters, declared, that the respondents were not entitled to have the respondent *Frances's* legacy paid, till after the death of the appellant *Mary*; but that the respondents were, in the mean time, entitled to have security for the payment thereof upon her death, and were also immediately entitled to have an appraisement and account of the plate, linen and household goods, and to have security that the same should be forthcoming, after the death of the appellant *Mary*; and therefore decreed, that it should be referred to the Master, to see if the said legacy of 1000*l.* was well secured, or not; and if he should find that the same was sufficiently

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ciently secured, then the said *Bartholomew Young* and the appellant *Mary*, were to give such further or other security as the Master should approve of, for payment of the said 1000*l.* after the death of the appellant *Mary*; and that the said *Bartholomew* and the appellant *Mary* were to give security, to be allowed of by the Master, for delivery of the plate, linen and household goods to the respondents, after the death of the appellant *Mary*; and it was further ordered, that the respondents should have their costs of suit out of the testator's estate, to be taxed by the Master.

The said *Bartholomew Young* and the appellant *Mary*, conceiving themselves aggrieved by this decree, in regard, as they were advised, the said entry in the Chamberlain of *London's* book was sufficient evidence to prove the freedom of the said *Thomas Sutton*, and that the respondents ought not to have had their costs out of the estate; they preferred their petition of appeal from the decree to the Lord Chancellor, in these particulars.

The respondents also preferred their petition of appeal from the decree, alledging, that they conceived themselves aggrieved thereby, in regard the 1000*l.* legacy became payable to the respondent *Frances*, on her attaining her age of 21, and ought to have been decreed to her, with interest for the same from that time; and not to wait for the same, till the death of the appellant *Mary*.

The cause was heard before the Lord Chancellor *Macclesfield*, on these two petitions of appeal, upon the 25th of *April*, 1724; when his Lordship was pleased to declare, that the respondents ought to be paid the said legacy of 1000*l.* with interest for the same, from the time the respondent *Frances* attained her age of 21 years: And did therefore order, that the said decree should be varied accordingly; and that it should be referred to the Master, to compute interest for the said 1000*l.* legacy, from the time the respondent *Frances* attained her age of 21; and with that variation, the former decree was to stand.

Before any report was made by the Master, *Bartholomew Young* died; having first made his will, and appointed the appellant *Arthur Young* executor thereof; by whom the suit was duly revived.

Soon

Soon afterwards the present appeal was brought, and on behalf of the appellants it was contended, that the entry in the Chamberlain of *London's* book was a sufficient evidence to prove the freedom of the testator *Thomas Sutton*, and as there was no dispute concerning the identity of the person meant and intended by that entry, the same ought not to have been made a question by the Court; or at least, it was a sufficient foundation for the Court to have directed an issue, to try whether the said *Thomas Sutton* was a freeman of *London*, or not; in which case, any defect in point of proof, might have been supplied as to the circumstances of the identity, or the same might have been directed to be enquired into by the Master. That the legacy of 1000*l.* given by the testator's will to the respondent *Frances*, was not payable till after the death of the appellant *Mary*; not only because all the personal estate was given to *Mary*, for her life, by the express words of the will, and which could not be answered if this legacy was to be paid in her life-time; but also because the legacy was not directed to be paid when *Frances* married, or came of age, but upon that contingency, was to be paid on *Mary's* death. It might be objected, that the testator had, by a separate bequest, given the respondent *Frances*, after the appellant *Mary's* decease, all his household goods, plate and linen whatsoever: But to this it was answered, that these specific legacies were given absolutely, not upon the contingency of *Frances's* marrying, or coming of age; and in that, the difference between those legacies, and the legacy of 1000*l.* consisted; not that the one was to be satisfied after the death of the widow, and the other in her life-time; but that the one was certainly to be satisfied after her death, the other upon a contingency only. It might also be objected, that by the will there were legacies of 10*l.* for mourning, two guineas for preaching the testator's funeral sermon, and 100*l.* to be laid out in his funeral, and for a grave-stone; and that tho' no time was limited by the will for the payment of these sums, yet it could never be supposed, the testator intended them to wait till his wife's death; and the legacy of 1000*l.* to the respondent *Frances*, stood upon the same reason. But to this it was said, that these legacies for mourning, &c. fell all under the consideration of funeral expences, which in their own nature are to be paid immediately, and are a debt upon the personal estate; and the declaring the uses to which they were to be applied, was to be construed as the appointing them to be directly paid; but

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Vile vol. 11,
p. 386. and
note.

that the case of these was greatly different from the 1000*l.* legacy, which being a considerable part of the estate, took off, in a great measure, from the benefit of that provision which was made for the wife, without any apparent intention of the testator so to do; no conclusion could therefore be drawn from these funeral legacies, to assist the forced construction which the respondents would put upon the testator's intention, in relation to the 1000*l.* legacy. Besides, the real estate devised to the appellant *Mary* for her life, was recovered from her; for want of a power in the testator to devise it; so that her only provision from him, was out of his personal estate.

P. Yorke.
C. Talbot,

To this, it was answered on the other side, that the appellant *Mary* and her late husband, by their answer insisted, that the testator *Thomas Sutton* was a freeman of *London*, and that the appellant *Mary* was entitled, as his widow, to a moiety of his personal estate, together with her *paraphernalia* and widow's chamber; wherefore as that matter was put in issue, and examined into before the hearing, it was incumbent on the appellant *Mary* to have proved it before the hearing; and she had no reason to expect to be indulged by the Court, with a liberty of making further proof of it after the hearing; and especially in support of a claim set up in opposition to the will of her husband, by which she was liberally provided for. That it plainly appeared to be the true intent and meaning of the testator, from the whole frame of his will, that the legacy of 1000*l.* should be paid to the respondent *Frances*, upon her attaining 21, or marriage, no other time of payment being mentioned; for in every case, where he intended that the payment of legacies should be postponed till after the death of his wife, as in the bequest to the respondent *Frances* of his household goods, plate and linen, he gave the same in express terms after the appellant *Mary's* death. And therefore it was hoped, that the Lord Chancellor's decree, and so much of the former decree as remained thereby unaltered, would be affirmed, and the appeal dismissed with costs.

DECREE
reversed.
Jour. vol. 22.
p. 459.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that such part of the decree of Mr. Baron *Price*, as ordered the respondents their costs of suit out of the testator's estate, should be reversed; but, that the said decree, as to all other parts thereof, should be affirmed: And it was further

further ORDERED and ADJUDGED, that so much of the decree of the Lord Chancellor as varied from the said decree of Mr. Baron Price, or the direction of the House, should be reversed.

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Walter Bagenal, Esq; - - - Appellant. Case 7.

Ann Bagenal, Widow, *Nicholas Bagenal*,
George Matthew, *Dudley Bagenal*, and } Respondents.
Benjamin Burton, - - - }

31st March, 1725.

DUDLEY Bagenal, Esq; deceased, the appellant's father, being seised in fee of the manor, town and lands of *Dunleckny*, and other manors and lands in the county of *Carlow*, in *Ireland*; did in the month of *May*, 1668, upon his intermarriage with the respondent *Ann*, in consideration of 1500*l.* her marriage portion, convey the said manors and lands to trustees to the use of himself for life, and afterwards, as to a considerable part thereof, to the use of the respondent *Ann*, as a jointure, for her life; and as to all the estate, after their deaths, to their issue male; with several remainders over. Subject to a power of revoking or altering the said uses and remainders, except the use limited to the respondent *Ann*.

Viner, vol. 4.
 p. 439. ca. 8. 9.
 vol. 12. p. 114.
 ca. 9. vol. 16.
 p. 442. note to
 ca. 1.
 2 Eq. ca. ab.
 172. ca. 4.
 646. ca. 20.

The marriage took effect, and the said *Dudley* had issue by the said *Ann*, the appellant their eldest son, *Nicholas*, *George* and *Dudley Bagenal* junior, and *Ann*, *Hellen*, *Catherine* and *Mary Bagenal*.

On the intermarriage of *Ann*, his eldest daughter, with *Sir Gervas Clifton*, Bart. it was, by articles dated the 16th of *June*, 1687, agreed, that the said *Dudley* should pay *Sir Gervas* 7000*l.* as a portion; viz. 2000*l.* immediately, which was accordingly paid, 2000*l.* more, to be secured by mortgage of the said *Dudley's* estate, and the remaining 3000*l.* on a contingency which never happened.

Dudley

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Dudley Bagenal afterwards, by deeds of lease and release dated the 16th and 17th of *October*, 1688, conveyed all his estate to trustees and their heirs, to his own use during his life; and afterwards, as to the said jointure lands, with an additional jointure, to the respondent *Ann* for her life; and as to all the rest of the estate after the said *Dudley's* death, and as to the said jointure after the death of his wife, to the use of *Walter Butler* and *Patrick Colclough*, other trustees, for 500 years, upon the trusts therein mentioned; with remainder to the appellant for life; remainder to his first and every other son in tail male; with several remainders over: And with a power for those in remainder, to make leases for any term not exceeding 21 years, at the full improved rent, and without taking any fine. — The term of 500 years was declared to be upon trust, that the trustees and the survivor of them, his executors, administrators and assigns, should, out of the yearly profits of the estate, raise and pay several yearly sums for the maintenance and education of the said children, until their portions became due; and then, upon further trust, for the raising such sum and sums of money out of the estate, not exceeding 2000*l.* as the said *Dudley Bagenal* and *Ann* his wife, or the survivor of them, should limit and appoint: Which power was intended and reserved, for paying the 2000*l.* agreed to be paid to *Sir Gervas Clifton*, and to be secured by mortgage of the estate, as aforesaid, and for no other purpose. — And it was also agreed, that the trustees, or the survivor of them, his executors, administrators, or assigns, should mortgage, lease, set over, or assign, the said estate, for all or any part of the said term, for raising the sum of 5000*l.* for the portions of the said younger children, as the said *Dudley* and *Ann* his wife, or the survivor of them, should appoint.

Mr. Bagenal, in pursuance of the marriage articles of *June*, 1687, did in 1693, or 1694, or at some other time after the year 1688, execute a deed which was made to bear date the 16th of *October*, 1688, and thereby bargained and sold unto *Sir Gervas Clifton*, all the said *Dudley's* estate for 500 years; upon condition to be void, on payment to *Sir Gervas*, of 2000*l.* in a month after he should settle 500*l.* *per ann.* jointure on his wife: And which deed, was intended as an execution of the power reserved

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in the settlement of the 17th of *October*, 1688, for raising the said sum of 2000 *l.* as aforesaid.

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The said *Dudley Bagenal* was afterwards attainted of high treason, on account of the rebellion in 1688, and all his estate became thereby forfeited, and vested in King *William* and Queen *Mary*: Whereupon Sir *Gervas Clifton* presented a petition to their Majesties for relief as to the said 2000 *l.* and interest, and obtained an order for referring the matter to the Attorney-General, who, in the year 1695, made a report, that his case was very compassionate; and the then Lord Deputy of *Ireland*, having signified to the Lords of the Council in *England*, that he agreed with the said report; Sir *Gervas* and the respondent *Ann*, who was very active in managing this matter, thereupon procured an order to receive some money, and did accordingly receive some money out of the said forfeited estate. — But the most part of the 2000 *l.* still remaining due, and the estate being by act of Parliament, vested in the trustees for sale of the *Irish* forfeitures, whereby Sir *Gervas's* order for receiving the money became of no effect, and the appellant being willing to make Sir *Gervas* what satisfaction he could towards the same; certain articles were, on the 22d of *June*, 1700, entered into between the respondent *Ann* of the first part, the appellant of the second part, and Sir *Gervas Clifton* of the third part, reciting the articles of the 16th of *June*, 1687; that Sir *Gervas* had settled the said jointure of 500 *l.* per ann. on his wife; and that it was doubtful, whether he could in law or equity, by virtue of the articles only, charge the said *Dudley's* forfeited estate for life with the said 2000 *l.* And also reciting, that the said *Dudley* made the settlement of his estate in *October*, 1688, with a power for him and his wife, or the survivor of them, to charge the same with any sum not exceeding 2000 *l.*; and further reciting, that during the said *Dudley's* life, by his attainder, they became incapable of executing the said power; but that if the said *Ann* survived, she might charge the said sum on the estate, for the benefit of the said Sir *Gervas*; and that the said *Ann* and the appellant thought themselves obliged to do what they could to secure the said 2000 *l.* or part thereof; and in consideration of 5 *s.* paid her pursuant to an agreement made between her and the appellant, the respondent *Ann* thereby agreed, that if she should survive the said *Dudley*, she would,

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within a month after his death, charge the term of 500 years with the said 2000*l.* as required by Sir *Gervas*, and for his use, or with so much thereof as should be then deficient, without interest; and the appellant did thereby also agree, that if the said *Ann* should die before *Dudley*, so that the said 2000*l.* could not be charged for Sir *Gervas*, that then the appellant would secure the sum of 1000*l.* to Sir *Gervas*, as council should direct; and in case the respondent *Ann* should live, and charge the estate with the said 2000*l.* that Sir *Gervas* should give four years for the payment thereof, without interest; but if he should recover the 2000*l.* out of the said *Dudley's* forfeited estate, then this agreement was to be void.

The appellant claimed his remainder in the estate under the aforesaid settlements, before the trustees of *Irish* forfeitures, and was decreed to the same accordingly. The respondent *Ann* also claimed, and was allowed her jointure; and the said *Nicholas*, *George*, *Dudley* and *Helen*, being then all minors, by their guardian claimed, and were allowed their interests in the premises; and *John Butler*, executor of *Walter Butler*, the surviving trustee of the 500 years term, claimed and was decreed to the same.

Sir *Gervas Clifton* also was allowed his claim to the 2000*l.* and afterwards received the same, out of the estate during the life of Mr. *Bagenal* the father, in full satisfaction of the 2000*l.* wherewith the estate or the term was chargeable.

The said *Dudley Bagenal* and the respondent *Ann* his wife, by deed dated in *December*, 1702, apportioned the 5000*l.* in manner following; viz. to *Helen*, then married to Sir *John Hales*, the sum of 1900*l.* to Dame *Ann* wife of the said Sir *Gervas*, being provided for before, 5*l.* to *Mary* and *Catherine*, 100*l.* each, to *Nicholas* and *George* 1000*l.* a-piece, and to *Dudley junior*, 895*l.*

The forfeited estate for life of *Dudley Bagenal*, continued in the trustees of forfeitures and their purchasers till his death, which happened in *July*, 1712; before which time, all his children arrived to their respective ages of 21, and all their portions were then payable. And the appellant thereupon became entitled to all the estate, except what was limited to the respondent *Ann* for

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for her jointure. Sir *John Hales* and his wife, and *George Bagenal* pressing for payment of their portions, the appellant procured *Thomas Aclon*, Esq; to advance and pay them the same, upon the appellant's joining in a conveyance of their share and interest in the 5000*l.* and the 500 years term. But the respondent *Nicholas* having been found a lunatic, and the care of him committed to the appellant, he maintained him for the space of fourteen years, and expended therein, and in endeavouring his cure, the sum of 700*l.* The appellant also paid his sisters *Mary* and *Catherine* their several portions of 100*l.* each.

The appellant being willing to have all these portions raised and paid, endeavoured so to do by making leases of part of his estate, out of the said term of 500 years, at the same rents which the tenants then actually paid upon leases made about six years before; and by selling the surplus advanced rent at 17 or 18 years purchase. And he accordingly made agreements with some of the tenants for that purpose, and requested *John Butler*, as the representative of the surviving trustee of the said term, to join and concur with him in those measures; But *Butler*, colluding with the respondent *Ann*, not only refused so to do, but brought an ejectment for recovery of the appellant's estate by virtue of the term; and in *Michaelmas* term, 1714, judgment was obtained thereon, and possession taken from the appellant accordingly.

Soon afterwards, *Butler* assigned over the term and his trust to the respondent *Benjamin Burton*; who also refused to execute the trust by raising the portions according to the directions of the settlement of 1688; but continued in the receipt of the rents and profits of the estate.

On the 24th of *April*, 1716, the respondents *Ann*, *Nicholas* and *Dudley Bagenal*, together with *Philip Savage*, Esq; preferred their bill in the Court of Chancery in *Ireland*, against the appellant and the respondent *Burton*, the respondent *Ann* and the said *Savage*, thereby praying to be decreed the sum of 2000*l.* and interest, out of the appellant's estate; alledging, that the respondent *Ann* had charged the same by deed of the 6th of *February*, 1712, to be paid to the said *Philip Savage*, according to the power in the settlement of 1688, for that purpose; and the respondents *Nicholas* and *Dudley*, prayed to be decreed their said several portions.

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The appellant by his answer to this bill, declared his willingness that his brother's and sister's portions should be raised and paid according to the settlement, but as to the 2000*l.* alledged to be charged for the benefit of the respondent *Ann*, the appellant insisted, that she was not entitled thereto; that money having been intended for Sir *Gervas Clifton*, and he having received the same out of *Dudley's* forfeited estate as aforesaid. And the respondent *Burton* also answered, and admitted the trust term to have been assigned to him.

On the 12th of *May* following, the appellant preferred his cross bill against the respondents and others, to compel the respondent *Burton* to join in making the leases out of the said term, or otherwise by means thereof, to raise the said sum of 5000*l.* for the portions; and for relief against the respondent *Ann's* demands.

Both causes being at issue, and witnesses examined, were heard before the Lord Chancellor of *Ireland* on the 27th of *May*, 1717; when his Lordship was pleased to decree the payment of the said 2000*l.* with interest from the date of the deed by which the same was charged on the said estate; and that the respondents *Nicholas* and *Dudley Bagenal*, should have their portions, with interest from the death of their father.

Soon after this decree, the appellant, by chance, found one part of the articles of the 22d of *June*, 1700, in *London*, and sent the same forthwith to *Ireland*, and thereupon an order was obtained for rehearing the causes; and on the 13th of *June*, 1717, the appellant exhibited a supplemental bill, setting forth the said articles, and praying a discovery of the same and the benefit thereof in the said causes.

The respondent *Ann* put in her answer to this bill, and thereby denied that she ever executed the articles; but insisted that if she had, they could be no bar against charging the said 2000*l.*

On the 25th of *June* following, both causes were reheard before the Lord Chancellor, assisted by the Lord Chief Justice *Whithead*, the Lord Chief Justice *Foster*, and the Lord Chief Baron *Gilbert*; when the respondent *Ann's* last answer being read, and the Court not being satisfied therewith, she was examined

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examined *viva voce* in open Court, and still denied the execution of the articles: Whereupon the Court was pleased to order and decree, that the said *Philip Savage* should have and recover, according to the deed made by the respondent *Ann* for that purpose, the sum of 2000*l.* out of the rents and profits of the trust lands; and that the respondents *Dudley* and *Nicholas*, should likewise have and recover out of the said lands, their respective portions, with interest for the same at 8*l.* per cent. per ann. from the death of the said *Dudley Bagenal*, senior; and it was referred to a Master to state the account. And it was ordered, that the respondent *Ann* should have an allowance for what she had expended in law suits for recovery of the said trust lands, and the said sums of money decreed thereout, and in executing the said trusts, together with the costs of these causes; both parties were to have all just allowances, and on return of the report, the Court would consider from what time the 2000*l.* should carry interest.

Some time afterwards, the subscribing witnesses to the articles of the 22d of *June*, 1700, being examined for the appellant fully proved the execution thereof by the respondent *Ann*, and the other parties; and the appellant coming to the knowledge of the deed of the 16th of *October*, 1688, tho' really made several years afterwards, for securing the 2000*l.* and of the several proceedings of *Sir Gervas* and the respondent *Ann* in relation to that sum; he, on the 1st of *July*, 1718, preferred a further supplemental bill against the respondent *Ann*, *Sir Gervas Clifton* and others, setting forth these several matters, and praying a discovery of the same and relief.

In the mean time the said *Philip Savage* died; and an order being made for reviving the causes on that occasion, the Master, on the 23d of *May*, 1723, made his report, and thereby computed 2000*l.* as due to the respondent *Ann*, and also a considerable sum for costs relating to the trust; he also computed the portions of the respondents *Nicholas* and *Dudley*, with interest from the death of their father; and reported several sums to have been received by the respondent *Burton* out of the appellant's estate, and several sums by him paid to the respondent *Ann*, on account of her said demand, and of the portions of the respondents *Nicholas* and *Dudley*.

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To this report the appellant took several exceptions, for that the Master had omitted to certify the portions of all the children, and what they had received on account thereof, and had allowed the respondent *Ann* the sum of 327*l.* for costs; and for that he had omitted to charge the respondent *Burton* with the whole rents he received out of the estate, and had omitted to give the appellant credit for several sums, which he had expended in the support, and endeavouring the cure of the respondent *Nicholas*.

On the 20th of *February*, 1723, the causes, as well on this report, as on the appellant's supplemental bills, were heard before the Lord Chancellor; when his Lordship was pleased to over-rule the appellant's exceptions. And on the next day, his Lordship was pleased to refuse to allow the reading of the said articles of the 22d of *June*, 1700; and also refused to admit the appellant's proofs of the execution of them, and of the aforefaid matters and proceedings to be read, and would not enter into the merits of the appellant's case; but ordered the appellant's said bills to be dismissed with costs.

C. Wearg.

J. Roche.

From all these decrees the appellant appealed; insisting, that the power in the settlement of the 17th of *October*, 1688, for raising 2000*l.* was intended and reserved by *Dudley Bagenal*, sen. for the satisfying *Sir Gervas Clifton* the 2000*l.* agreed to be paid him, by the articles on his intermarriage in 1687, and to be secured by mortgage of *Mr. Bagenal's* estate in *Ireland*. That this intention was further manifest, not only from the deed made some years after the settlement of *October*, 1688, (tho' appearing to bear date the day next before the day of the date thereof) by which *Mr. Bagenal* raised a term of 500 years in his estate, for payment of 2000*l.* to *Sir Gervas*; but also from the articles of the 22d of *June*, 1700: And it was apprehended, that the deed so antedated, ought to be construed in equity, as a full execution of the power contained in the settlement of *October*, 1688. That *Sir Gervas* having recovered and received this 2000*l.* out of the estate, the respondent *Ann* ought not to have executed the power over again, or to have received the money out of the estate a second time, for her own benefit; and if the 2000*l.* was to be charged on the appellant's estate, the same ought not to have carried interest, as decreed, it being to be raised out of the rents, issues and profits.

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That the respondent *Burton* ought not to have applied all the rents of the appellant's estate, to the payment of the younger children's portions, while the appellant could not receive a penny thereout for his own support; but the Court ought to have decreed *Burton* to have raised the 5000*l.* for these portions, by leasing, selling, mortgaging, or assigning the trust term, or part thereof, according to the directions of the settlement of *October*, 1688, for that purpose. That the several exceptions taken by the appellant to the Master's report, ought to have been allowed; and the Court ought also to have admitted the said deeds and articles, and the appellant's said proofs to have been read. That by the decree of the 25th of *June*, 1717, the said sum of 2000*l.* being ordered to be paid to the said *Philip Savage*, who soon afterwards died, the said several suits ought to have been revived against his representatives, and the Master ought to have proceeded on the account; nor should the Court have made any further decree in the causes, without the representatives of *Savage* being made parties. It was therefore hoped, that the said several decrees and proceedings would be reversed; and the appellant's said deeds, articles and proofs admitted to be read.

On the other side it was argued, that the respondent *Ann*, having survived the said *Dudley Bagenal* her husband, had full and absolute power, by virtue of the said settlement of *October*, 1688, to limit or appoint any sum of money, not exceeding 2000*l.* to be raised and paid according to such limitation or appointment, out of the rents and profits of the trust estate; and having by deed, in 1712, limited and appointed the same to be paid to *Philip Savage*, it became thereby a proper charge on the said lands, and a due execution of the power in the said settlement. That this power to raise 2000*l.* was not intended for raising the 2000*l.* due to Sir *Gervas Clifton* by his marriage articles, as the appellant would suggest, nor expressed so to be; for it appeared, by the appellant's own shewing, that the 2000*l.* to be paid by those articles to Sir *Gervas*, was to be paid within one month next after he should have appointed to his wife, lands of the yearly value of 500*l.* and which appointment was accordingly made in *July*, 1692, after Sir *Gervas* came of age; but the 500 years term, on which the respondent *Ann* had power to raise the 2000*l.* was only to commence upon the death of her husband, which did not hap-

P. Yorke.

C. Talbot.

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pen till the year 1712. That Sir *Gervas Clifton* claimed before the trustees of the forfeited estates, the 2000*l.* due to him by virtue of his marriage articles only, and the same was accordingly decreed to him; the respondent *Ann* also claimed before the trustees, the power of charging the trust estate with 2000*l.* and the same was likewise decreed to her: Which claims and decrees were not only several and distinct, and had no relation to each other, but shewed, that these two sums of 2000*l.* were also several sums of money. That the pretended articles of the 22d. of *June*, 1700, supposing the respondent *Ann* to have actually executed them, could not take from her any right which she might have to charge the said 2000*l.*; because it appeared, by the appellant's own shewing, that the provision in those articles was contingent, and to take place only, in case Sir *Gervas* did not recover 2000*l.* on his marriage articles; and he being decreed to this 2000*l.* by the trustees, the articles of *June*, 1700, became, by an express clause therein, utterly void: Besides, Sir *Gervas* having received the said 2000*l.* before the death of *Dudley Bagenal*, and consequently before the appellant became entitled to his remainder, and before the respondent *Ann* had any power to charge the said 2000*l.*; these articles of 1700, were only made use of by the appellant, as a pretence to put the respondent *Ann* to great expence and trouble on so many bills, hearings and rehearings. That these articles were in issue in the original causes, but not proved therein; and therefore, after publication and a hearing, it was irregular in the appellant to examine witnesses to the proof of the articles, especially upon a bill of discovery only: But as the appellant had examined the same witnesses on his supplemental bill, to the proof of the articles, and being allowed to read the same, and all the other proofs taken in the cause; he had no just ground of complaint, that his proofs were not admitted to be read: And having offered no proof in support of any new matter alledged in his said supplemental bill, it was but just that the same should be dismissed with costs.

DECREES
reversed
in part.
Jour. vol. 22.
p. 478.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree of the 25th of *June*, 1717, should be affirmed; saving that part thereof which directed, that the respondent *Ann* should have an allowance for what she had expended in law suits; which direction was reversed: And it was further ORDERED and ADJUDGED, that so much of the order

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order of the 20th of *February*, 1723, as over-ruled the appellant's third exception, and directed the interest of the 2000*l.* to be computed from the date of the deed of the 6th of *February*, 1712, should be reversed: And it was further ORDERED, that the Court of Chancery should cause an account to be taken, from what time the said 2000*l.* might have been raised out of the yearly rents and profits of the lands; and that from that time, the said 2000*l.* should be payable with interest; and that so much of the money, as had been already paid to the respondent *Ann*, should, in the first place, go towards discharging the interest, and the surplus towards the discharge of the principal money; and so much as remained unpaid of the said principal and interest, should be paid to her by the respondent *Burton*, out of the money in his hands: And it was likewise further ORDERED and declared, that the 5000*l.* to be raised for the younger children of the respondent *Ann* and her deceased husband *Dudley Bagenal*, was to be raised by mortgage or sale; and that the appellant, out of the profits of the lands subject to the said portions, by him received, was to be accountable for no more than was sufficient to keep down the interest of the said portions; and that what remained due to the said children, for principal money and interest, should be raised by mortgage or sale: And it was further ORDERED and ADJUDGED, that the Court of Chancery should cause an account to be taken, of what was due to the respondents *Nicholas* and *Dudley Bagenal*, for the interest of their portions respectively; and that what remained due to them respectively for such interest, should be first paid by the appellant, out of the rents and profits of the lands by him received; deducting all reasonable allowances, for money expended by him on account of the estates, or of the said *Nicholas* and *Dudley* respectively; and that what yet remained due for principal and interest, should be paid by the respondent *Burton*, as far as the money in his hands would extend; and if that was not sufficient, the residue should be raised by mortgage or sale of the lands: And that all other parts of the orders, decrees and proceedings complained of, which varied from, or were inconsistent with the directions now given, should be reversed; but that the same, as to all other parts thereof, should be affirmed: And it was further ORDERED, that the said Court of Chancery should give such proper directions, for the better execution of this judgment, as should be just.

Case 8. *Leonard Hatfield, Esq;* - Appellant.

Jane Hatfield, alias Adams, alias Chichester, a Pauper, Richard Porter and Henry Cookman, } Respondents.

2d April, 1725.

Viner, vol. 15.
p. 262. ca. 8.
2 Eq. ca. ab.
585. note (a).

THE respondent *Jane* was descended from the family of *Chichester*, Earls of *Donnegal* in *Ireland*, and had a liberal education; but being deprived of her parents in her infancy, she married one *Adams*, who, by misfortunes being reduced in his circumstances, left her at his death, in a poor condition.

Leonard Hatfield, Esq; the appellant's father, happening to lodge in the same house in *Dublin* with the respondent *Jane*, professed great friendship for her, and after many intreaties, prevailed on her in *August*, 1714, to go to his house at *Killinure*, forty seven miles from *Dublin*, there to remain as a companion to his daughter *Ann Hatfield*, to instruct her in what was necessary for her education, and to manage his domestic affairs; for which he promised to give her 20*l.* per ann. and in this station she continued till *July*, 1718. During her stay there, Mr. *Hatfield* observing the great care, industry and good behaviour of the respondent *Jane*, thought her a fit person to be his wife, and having therefore made his addresses to her, they were, in *July*, 1718, married by a minister of the church of *Ireland*, as by law established, and cohabited as man and wife until his death.

On the 14th of *November*, 1719, Mr. *Hatfield* made his will, and thereby devised to the respondent, by the name of his beloved wife *Jane Hatfield*, 40*l.* per ann. for her life, for her support, out of the rents and profits of his estate at *Killinure*, in the county of *Westmeath*; 20*l.* to be paid her immediately after his decease, and 10*l.* per ann. more out of the lands of *Portlamon*, demised to him by *Robert Rockfort* for 41 years, when the same should be recovered from the said *Rockfort*; and he devised to the appellant, his son and heir, all his other real and personal estate, of about 600*l.* per ann. and made him sole executor.

And

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And by a codicil, which was all of the appellant's hand-writing, and dated the 24th of *December* following, the testator, for further securing the said 40*l.* *per ann.* assigned and made over to the respondent *Jane* the lands of *Ballybegg*, for her life; and after her decease, to *Arthur*, his son by her, for life. —

And as a still further security, the testator, by deeds of lease and release, dated the 3d and 4th of *February*, 1719, charged the lands of *Ballybegg* with the payment of the said 40*l.* *per ann.* to the respondent *Cookman*, in trust for the respondent *Jane*, for her support for life; and after her decease, for his said son *Arthur* for his life.

In *March*, 1719, the testator died; and immediately after he was buried, the appellant turned the respondent out of doors, and detained from her, her wearing apparel and other necessities; and having proved the will, possessed himself of all his father's real and personal estate, to a very considerable value; and released the lease of *Portlamon* to *Rockfort*, in consideration of 480*l.* but refused to pay the respondent *Jane* one penny for her support.

Whereupon she, being admitted a pauper, exhibited her bill in *May*, 1720, in the Court of Exchequer in *Ireland*, against the appellant and the said *Cookman*, to have a specific execution of the trust in *Cookman*, and to recover the said 40*l.* and 10*l.* *per ann.* and the 20*l.* legacy.

The appellant, by his answer to this bill, admitted the will; but said, he did not know whether the respondent's name was *Hatfield*, or whether she was ever married to his father; and that he never heard of the lease and release of *February*, 1719, until he found the memorandum of them registered; and insisted, that before legacies were paid, all debts and funeral expences must be discharged, and that the testator did not leave sufficient assets to discharge the same.

The respondent *Jane* having excepted to this answer, as insufficient, the appellant answered over; and confessed, that since his former answer, he came to farther knowledge of his father's debts, credits and personal estate, and believed them sufficient to pay his debts, legacies and all just demands.

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Pending this suit, the appellant made the agreement for 480*l.* with *Rochfort*; whereupon the respondent *Jane* amended her bill, and charged him with that agreement; which, by his answer, he confessed, and also that he had covenanted to indemnify *Rochfort* from the respondent's claim.

The appellant, as son and heir and sole executor of his father, on the 23d of *January*, 1720, filed a cross bill against one *Richard Porter* and the respondent *Jane*, by the name of *Jane Ponter*, alias *Adams*, alias *Hatfield*, (but to which *Cookman* was no party) alledging, that the respondent *Jane* was only a servant to the testator, and received several sums for his use, which she did not account for; that he, being old, weak and infirm, she had so great an ascendant over him, that she persuaded him to make a will, framed by herself, whereby he devised to her several legacies; that the said *Richard Porter*, pretending to be the respondent's husband, by deed dated the 18th of *November*, 1720, in consideration of 40*l.* released to the appellant the said suit commenced by the respondent, and all claims and demands which he, or the respondent had, or might have under the said will, or deeds to *Cookman*, in trust for the respondent, or her son *Arthur*, and all suits in law or equity, and covenanted to make further assurances; the bill therefore prayed to be relieved according to the nature of the case, and that the respondent *Jane* might set forth, whether she was not lawfully married to the said *Richard Porter*, in 1713 or 1714.

To this bill, the respondent answered by the name of *Jane Hatfield*, alias *Adams*, alias *Chichester*; and denied that the testator intrusted her with money to be expended in house-keeping, or that she received any rents, or other money from him; said, that Colonel *Chichester*, her uncle, bequeathed to her 100*l.* which the testator received, and applied the same towards the appellant's education in the *Temple*; denied that the will was formed, dictated or directed by her, or that she was present when the same was made; the first knowledge she had of it being on the 24th of *December*, 1719, when the appellant read it to his father; said she was a stranger to any deed executed by *Porter*; insisted on her rent-charges and legacy; and as to that part of the bill which required an answer

answer to the charge of her marriage with *Porter*, she pleaded, that in *July*, 1718, she was lawfully married to the testator, and cohabited with him as his lawful wife until his death in 1719, and had by him a son living, called *Arthur Hatfield*; and therefore insisted, she was not by law compellable to answer the said matter, it tending to criminate and make her guilty of bigamy, which, by the law of the land, is felony. And this plea being afterwards argued, was allowed.

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The appellant got *Porter* to put in an answer, insisting, that he was married to the respondent *Jane*, and owning the release, as stated in the cross bill: Whereupon the respondent instituted a cause in the Consistory Court of *Dublin*, in jactitation of marriage against *Porter*; and obtained judgment therein, and a definitive sentence against him.

Issue being joined in the original cause, and witnesses examined, the same was heard on the 3d of *February*, 1723, when the appellant making default, the Court made a conditional decree against him; and reserved their judgment as to *Cookman*, till the cause should be heard on such conditional decree.

After which, issue being joined in the cross cause, and the appellant having paid the usual costs for the conditional decree, obtained an order that the cross cause should be heard on the pleadings, at the same time with the original cause; and accordingly both causes were heard on the 3d of *July*, 1724, upon the merits, when on reading the proofs on both sides, together with the said deeds, will and definitive sentence, it was decreed, that *Cookman* should execute the trust reposed in him by the deeds, and permit the respondent *Jane*, as occasion required, to sue in his name; and that she should have and recover against the appellant the 40*l.* per ann. during her life, out of the rents, issues and profits of *Killinure* and *Ballybegg*, and the arrears thereof since her husband's death, and the said lands were to stand charged therewith; and that the respondent *Jane* should have and recover from the appellant 10*l.* per ann. from the time that he compounded with, or surrendered his interest to *Rochfort*, during the time that the said 41 years lease of *Portlamon* would have continued, if she should so long live,

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T. Lutwyche.

C. Talbot.

live, and also the 20 $\frac{1}{2}$ legacy, and interest for the same from the expiration of a year after the testator's death, together with her costs; and it was referred to the proper officer to state the account, and the Court dismissed the cross bill with costs.

From this decree the appellant appealed, and on his behalf it was said to be fully proved in the cause, that the respondent *Jane* was married to the said *Richard Porter*; and that the decree in the Spiritual Court, if subsisting, was a collusive proceeding, founded on the consent of *Porter*, and therefore ought not to be admitted as evidence, in bar of any interest which the appellant claimed by *Porter's* release antecedent to it. That this sentence had since been reversed, by a decree of the same Court; from whence, and also from the nature of the respondent *Jane's* case, she was not entitled to any assistance from a Court of equity. That besides other evidence in the cause, the respondent's marriage with *Porter* was proved by his oath, and confirmed by several other circumstances; such as her going by his name, writing letters to the appellant's father threatening him with her husband, procuring her liberty when arrested by another name, by making affidavit of her being *Porter's* wife, and giving receipts in the name of *Porter*. And though the respondent *Jane* after all these transactions, had sworn by her answer, that she never went by the name of *Porter*, yet this was evidently untrue; and was not only a high aggravation of her other crimes, but afforded a further reason why a Court of equity should not assist her, in taking advantage of her impositions upon a very infirm old man, to the prejudice of his family. That if the respondent *Jane* had been entitled to any thing under the said deeds and will, the release of her husband *Porter* was a sufficient discharge; and tho' what passed by the release was limited to *Cookman*, in trust for the sole use of her and her assigns; yet Mr. *Hatfield* being therein mentioned as her husband, the parties could not intend to exclude the real husband, whom they had not in their contemplation, and of whom they took no notice; and he becoming entitled to the benefit of the said trust, might well release it, at least during his own life. But if it could be construed, that by this deed the wife had a separate estate, not subject to her husband's controul as to the 40*l.* per ann. yet it could not be pretended, but that the husband's release discharged the 10*l.* per ann. and the

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the 20*l*. legacy, which were given directly to her by the will; and therefore belonged to the husband, and to the appellant as claiming under him, whose cross bill should not therefore have been dismissed, nor costs given against him. And as to the 40*l*. being objected to as a small consideration, the husband could have released without any consideration; and the consideration of his wife's having the said annuities and legacy, arising *ex turpi causa*, and being obtained in such a manner, might be a very reasonable inducement to him to accept of the smaller consideration for the said release.

On the other side it was said, that *Porter* was a poor pin-maker, set up and supported to defraud the respondent; and that it appeared in proof, that indirect means were used, and money given to prevail on persons to swear, that the respondent was married to *Porter* before she married the appellant's father. But it was contended, that whether she was married to *Porter* or not, being a matter properly determinable in the Ecclesiastical Court, the same had been already determined there; and she had the definitive sentence of that Court in jactitation of marriage against *Porter*, which was read on the hearing in the Exchequer, and was all she could do against him. That if the respondent was actually married to *Porter*, as she was not, yet such marriage ought not to stand in her way; because the provision made for her by the appellant's father, was in the nature of a provision for her separate use and maintenance, during her life. That the release insisted on by the appellant, was proved in the original cause, wherein it was not in issue, and consequently the Court of Equity could take no notice of it. But if this release had been duly proved, it ought not to influence the case; because from the smallness of the consideration of 40*l*. for releasing 50*l*. *per ann.* and 20*l*. (which was all the respondent had to support herself and her child) it appeared to be fraudulent and iniquitous. That after the allowance of the plea, the appellant ought not to have brought the matter of the marriage with *Porter* in issue, or examine into it, the same being *turpis causa*, and not fit or proper for a Court of Equity. And as to the 40*l*. *per ann.* settled on *Cookman*, in trust for the respondent's maintenance, the appellant could have no decree for it on his bill, even tho' the marriage with *Porter* was ever so clearly proved; because he had not made *Cookman* a party to that bill. It was therefore hoped,

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hoped, that the decree would be affirmed, and the appeal dismissed with costs.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

Case 9. *Benjamin Burton and Richard Nutley, - Appellants.*

John Slattery, - - - Respondent.

2d April, 1725.

BY articles of agreement dated the 8th of May, 1703, between *James Duke of Ormond* and *Charles Earl of Arran* of the one part, and *John Moreton* and others, creditors of the said Duke, of the other part; it was covenanted, that the Duke, or his commissioners, should before the 29th of September then next, sell and convey lands in *Ireland* to purchasers, for such prices as they should think fit; allowing five years time for payment of the purchase money, with interest, to be secured for the use of the said creditors, in satisfaction of their debts: Who thereby nominated and appointed the appellants to be their trustees, to whom the securities should be given, for the monies which should be raised by such sales.

By indentures of lease and release, dated the 14th and 15th of September following, the Duke, pursuant to the said articles, and in consideration of 1769*l.* 16*s.* *Irish* money, mentioned to be paid by the respondent, (tho' in truth it was not paid, but intended to be secured for the benefit of the creditors) did grant and convey to the respondent and his heirs, the lands of *Ballymore*, in the county of *Tipperary*, in *Ireland*.

And by other indentures of lease and release dated the 16th and 17th of the same month, the respondent, in consideration of the 1769*l.* 16*s.* so due and owing from him for the said purchase, did grant and convey to the appellants, the said lands with

with their appurtenances; to hold to the appellants, their heirs and assigns, in trust for the aforesaid creditors, equally in proportion to their debts; but subject to a proviso or condition, that if the respondent, his heirs or assigns, should pay to the appellants, their heirs or assigns, at *Strongbow's Tomb* in *Christ Church*, in *Dublin*, 1769*l.* 16*s.* by five equal payments within the space of five years; viz. one equal fifth part on the 29th of *September*, 1704, one other fifth part on the 29th of *September*, 1705, one other fifth part on the 29th of *September*, 1706, one other fifth part on the 29th of *September*, 1707, and the remaining fifth part on the 29th of *September*, 1708, with interest for each of the said fifth parts, at the rate of 5*l.* per cent. per ann. from the date of the said indenture, till the same should thereby become payable, then the said indenture was to be void. And it was thereby further covenanted, agreed and declared, that if the respondent, his heirs, executors, or administrators, should fail, or neglect to pay all, or any of the said monies, in such manner and at such times as in the said proviso or condition was expressed, by the space of three months after; that then and in such case, from and immediately after the expiration of three months from the time that every sum should become payable, the respondent should pay for every such sum so unpaid, after the rate of 8*l.* per cent. per ann. until the actual payment thereof.

There remaining due to the appellants, over and above all monies paid by the respondent for principal and interest, computing the same at the rates aforesaid, 1930*l.* 15*s.* 8*d.* the appellants, in *Michaelmas* term, 1721, exhibited their bill in the Court of *Chancery* in *Ireland*, against the respondent, to have the said demand satisfied; or, that he might be foreclosed of all equity of redemption. To this bill the respondent put in his answer, and thereby admitted the mortgage, and that he had paid no more than 1360*l.* in part of the monies due thereon; but insisted, that no more than 5*l.* per cent. interest should be allowed during the first five years, or till the last payment became due.

On the 10th of *December*, 1723, the cause came to a hearing on bill and answer, before the Lord Chancellor of *Ireland*; who, notwithstanding the respondent insisted by his answer,

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that no more than 5*l.* *per cent.* should be allowed during the first five years only, which expired in 1708, was pleased to decree, that it should be referred to a Master to state and settle an account between the appellants and respondent, for the said principal sum of 1769*l.* 16*s.* and interest at 5*l.* *per cent.* *per ann.*; and further, that on the respondent's paying such principal and interest to be reported due, the appellants should deliver up to him the several deeds in the pleadings mentioned.

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C. Talbot.

From this decree the appellants appealed; insisting, that the respondent ought to have been decreed to answer interest, after the rate of 8*l.* *per cent.* *per ann.* for every principal sum, from the end of three months after each payment became due; it being expressly so covenanted and agreed by the mortgage deed, and the common interest in *Ireland* at that time being 10*l.* *per cent.* That the appellants ought not by the decree to be obliged to deliver up to the respondent, the articles of agreement made with the creditors, those articles being no part of his title to the estate. That the decree ought to have allowed the appellants their costs, the respondent having by his answer, in express terms, admitted a ballance to be due from him on the mortgage. And lastly, that in default of the respondent's paying the principal interest and costs, within a limited time after the Master's report, he ought to have been decreed to stand foreclosed of all equity of redemption of the said estate.

There does not appear to have been any case printed on the part of the respondent, nor did he appear at the hearing of the appeal.

DECREE
reversed.
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AND therefore, after hearing the same *ex parte*, it was ORDERED and ADJUDGED, that the decree should be reversed; and that the said Court of Chancery should cause an account to be taken of what was due to the appellants for principal money and interest, the interest to be computed according to the mortgage deed; viz. 5*l.* *per cent.* *per ann.* for every principal sum, till three months after each payment became due; and from the end of every such three months, at 8*l.* *per cent.* *per ann.* and that the appellants costs should likewise be taxed: And on the respondent's payment of what should be reported due to the appellants, for principal interest and costs, within three months after the account taken and costs taxed, at such place as the said

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said Court of Chancery should direct, the appellants should, at the respondent's charge, reconvey the mortgaged estate to the respondent and his heirs, and deliver up the mortgage deed; and also upon the respondent's request, and at his charge, give him an attested copy of the articles of agreement in the pleadings mentioned; but in default of payment of the said principal interest and costs, according to the direction aforesaid, the respondent should be absolutely foreclosed of all equity of redemption of the mortgaged premises.

John Putland an Infant, Son and Heir
of *Thomas Putland* deceased, by *Jane*
Putland Widow, his Mother and next
Friend; and the said *Jane Putland*,
and *Richard Hefham*, Doctor of Phy-
sick, Executors of the said *Thomas*
Putland,

Case 10.

Appellants.

Sir Walter Burrows, Bart. Respondent.

5th April, 1725.

SIR *Kildare Burrows*, being seised in fee of the manor, town and lands of *Castletown Omy* in *Queen's* county, and of the town and lands of *Grange Mellon* and *Giltown*, in the county of *Kildare*, in *Ireland*, with their several sub-denominations and appurtenances, did, together with his wife *Dame Elizabeth*, by deeds of lease and release dated the 10th and 11th of *June*, 1700, in consideration of 3000*l.* really and *bona fide* paid to him by *Thomas Putland*, grandfather of the appellant *John*, grant and convey all and singular the said lands and premises, to the said *Thomas Putland* and his heirs; subject to a proviso for redemption, on payment of the said 3000*l.* and interest, at 8*l.* per cent. per ann. by *Sir Kildare Burrows*, his heirs or assigns, at the end of seven years from the date thereof. In which deed of release, were contained covenants for levying fines and suffering common recoveries, and making further assurances, and other usual covenants; and both deeds were witnessed by *Robert Johnston*,

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Johnston, afterwards one of the Barons of the Exchequer in Ireland, and brother in law to the said Sir *Kildare Burrows*.

Fines and recoveries were accordingly levied and suffered of the premisses, to the uses in the said deed of release mentioned.

The said *Thomas Putland* being so seised of the said mortgaged premisses, did, on the marriage of *Thomas Putland* his eldest son, the appellant *John's* father, with the appellant *Jane*, who was the daughter of *John Rotton*; in consideration of that marriage, and of a considerable marriage portion received with her, by deeds of lease and release dated the 10th and 11th of August, 1708, grant and convey the said premisses, *inter alia*, to *John Rotton* and *Edward Ryly*, and their heirs, to the use of the said *Thomas Putland* the son for life; remainder to his first and every other son on the body of the said *Jane* to be begotten, and the heirs male of their bodies, with other remainders over: But subject to a proviso, that if the mortgage money should be paid, the same should be laid out by the trustees in the purchase of lands, to be settled to the same uses.

Sir *Kildare Burrows* afterwards paid several sums of money, in part of the interest of the said mortgage, and continued in the possession of the mortgaged premisses till his death, which happened in March, 1708; leaving the respondent Sir *Walter* his son and heir, who, after his father's death, likewise paid some money, at several times, in part of the interest of the mortgage; but there being a very considerable arrear due, *Thomas Putland* the son, on the 15th of January, 1710, exhibited his bill in the Court of Chancery in Ireland, against the respondent Sir *Walter*, Dame *Elizabeth* his mother, and also against *John Lyons*, who claimed the lands of *Grange Mellon*, part of the mortgaged premisses, by virtue of two leases, under the yearly rent of 140*l.* per ann.; and prayed, that the money due upon the mortgage might be paid, or that the equity of redemption of the respondent Sir *Walter* might be foreclosed.

Sir *Walter*, who was then a minor, and the said *John Lyons*, answered the bill jointly; and the respondent Sir *Walter*, by his guardian, admitted that his father had borrowed money from the appellant's grandfather, and had executed such mortgage as in the bill stated, and that the estate was come to him; but insisted,

insisted, that his father had made some settlement of the premisses upon him, and did not know whether the same was subject to the mortgage. And the said *John Lyons* insisted on his lease of *Grange Mellon*, part of the said mortgaged premisses.

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The respondent *Sir Walter* having attained his age, and *Lyons* having, pending the suit, assigned over his interest in the premisses to *Sir John St. Leger*, one of the Barons of the Exchequer; the appellant *John's* father, on the 22d of *January*, 1716, exhibited a supplemental bill against the respondent and *Baron St. Leger*, for a discovery of what pretended settlements were made of the premisses by the respondent's father, and when, to whom, and on what condition the same were made; and insisted, that if he had made any settlement on the respondent his son and heir, the same was voluntary, and could not affect the mortgage, or the then plaintiff's title thereto, he being a purchaser for a valuable consideration, without notice of any settlement; and he likewise insisted, that whatever settlements were made, the same were barred by the fines levied, and the recoveries suffered upon the execution of the mortgage; and therefore prayed, that the respondent might either redeem, or be foreclosed.

The respondent, on the 19th of *August*, 1718, put in his answer to this bill; and thereby insisted, that the mortgaged premisses were, by some deed prior to the mortgage, for a valuable consideration, settled upon him in remainder; and that his father had no power to make such mortgage, nor was the respondent in any manner liable to the payment of the money so borrowed, he being, by such settlement, only tenant for life of the mortgaged premisses; but whether the several uses by the said settlement limited, were barred by the fines and recoveries, he submitted to the Court. The Baron also put in his answer to the bill, insisting on the assignment of the leases to him from *Lyons*.

The appellant's father having replied, issue was joined in the cause, and rules for publication passed, but no witnesses were examined for the respondent, either to prove the pretended settlement, or any copy or notice thereof, tho' he applied for; and obtained a commission to examine his witnesses; the then plaintiff,

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plaintiff, however, proved the execution of the mortgage, and the settlement made upon his marriage; and on the 21st and 22d of February, 1718, the cause was heard before the Lord Commissioners for hearing and determining causes in the absence of the Lord Chancellor; when it was decreed, that the then plaintiff *Thomas Putland*, and the respondent *Sir Walter Burrows*, should go to an account before the Master; and that *Baron St. Leger* should account for the rent of such part of the mortgaged premises as were held by him, and all parties were to have just allowances; and after the Master's report, the Court would consider whether the appellant's father ought not to have his costs, and would make such further order as should be just.

Pursuant to this decree, several proceedings were had before the Master upon the accounts thereby directed; and when the Master was ready to make his report, the respondent petitioned the Lord Chancellor, setting forth that he was informed, his father *Sir Kildare Burrows* had, upon his marriage, entered into articles for settling the mortgaged premises, whereby he was to be only tenant for life; that after the marriage took effect, a settlement was made pursuant to the said articles; that subsequent to that settlement, his father had borrowed 3000*l.* from *Thomas Putland*, for which he mortgaged the premises to him; that *Thomas Putland*, his son, had brought his bill against the respondent to redeem, or be foreclosed; and that tho' the respondent had by his answer, insisted, that his father had no power to mortgage the premises, yet, not being able to prove it, a decree was pronounced against him: But being now informed, that the said *Thomas Putland* had notice of the said articles and settlement, before the money was lent; and, that he did not doubt to prove the execution of the said articles and settlement, he therefore prayed, that the cause might be reheard: Which was ordered accordingly.

At the same time, the respondent filed a bill of discovery against the said *Thomas Putland*, the appellant *John's* father; stating, that upon his father's marriage with the respondent's mother, articles were entered into, whereby the mortgaged premises were to be settled upon the respondent's father for life; remainder, as to part, to the respondent's mother for life; remainder to the first and every other son of that marriage in tail

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tail mail, with several other remainders over; and that pursuant to the said articles, after the marriage took effect, a settlement was made accordingly. That *Thomas Putland*, who lent the respondent's father 3000*l.* upon a mortgage of the said premises, and his agents, had notice of the said articles and settlement, before any money was lent; and that the same were delivered to the mortgagee, to be by him cancelled. That *Thomas Siffon*, who was agent for the mortgagee, in an answer to a bill exhibited against him, during the respondent's infancy, had admitted notice of such articles, and that he had seen the same; that *John Rotton* had copies thereof delivered to him, and full notice of the same, before the intermarriage of his daughter with the appellant *John's* father: That the said *Thomas Putland* the son, and the trustees in his marriage settlement, had, before the marriage, notice of the said articles and settlement; and therefore prayed, that the defendants might discover the same, and that the said answer might be made use of at the rehearing of the original cause.

To this bill, the said *Thomas Putland* put in his plea and answer; and by his answer denied that he, at any time before his marriage, or that the said *John Rotton*, or any trustee in his marriage settlement, to his knowledge or belief, had any notice or intimation of the articles made on the marriage of the respondent's father, or of any settlement made pursuant to such articles; nor did he ever hear, or believe, there were any articles entered into, whereby the respondent's father was to be tenant for life of the premises, with remainder over to his first and every other son: But insisted, that if *Sir Kildare Burrows* had made any settlement, limiting the premises, after his death, to the respondent in tail, the same was voluntary, and could not affect the mortgagee, who was a purchaser, without notice, for a valuable consideration, and had a good right thereto, both at law and in equity. He also denied the charges in the bill from *Siffon's* answer, for that *Siffon* swore, the articles contained no limitation to the issue of the marriage, and were made after marriage. And as to so much of the bill, as prayed a discovery of any articles or settlements, or copies thereof, or any deeds relating to the mortgaged premises, and to bring the same into Court; he pleaded his marriage settlement, and that he was a purchaser for a valuable consideration, without notice to him, or any person acting for him, on his said marriage.

This

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This plea was argued on the 12th and 13th of July, 1720; and it being insisted, that tho' the defendant denied any manner of notice or intimation to him, or his trustees, or that they saw the said articles, yet, it being charged, that the defendant's wife's father had a copy of the articles delivered to him before the marriage of the defendant, the defendant should have denied that fact; it was therefore ordered, that the defendant should amend his said answer and plea: But the respondent having petitioned for, and obtained a rehearing of the said order, the same was reheard on the 11th of November, 1720, and the plea over-ruled. The respondent, however, never proceeded farther in that suit, nor insisted upon a farther answer from the appellant's father, tho' he lived near five months after the plea was over-ruled.

Before any further proceedings were had in the cause, the said defendant *Thomas Putland* died, on the 31st of March, 1721, leaving the appellant *John*, his son and heir by the appellant *Jane*; but, before his death, he made his will, and thereof appointed the appellants *Jane* and *Dr. Hefham* executors, who proved the same.

The appellants the executors, being entitled to all the arrears of interest of the mortgage, due at the death of their testator, and the appellant *John* to the principal money thereby secured, by virtue of the settlement upon his father's marriage; they, in April, 1722, filed their bill of revivor against the respondent, and also against *Baron St. Leger*, the Bishop of *Clogher*, who was executor of *John Rotton*, deceased, and *Mary Ryly*, the executrix, and *James Ryly*, the son and heir of *Edward Ryly*, who was the surviving trustee of *Putland's* marriage settlement; praying, that the proceedings might be revived, and that the appellants, as being entitled to the mortgage money and interest, might have the benefit of the said decree in 1718, and to have an account of the mortgage money and the interest thereof; that the arrears of interest due in the life time of the said *Thomas Putland*, might be paid to the appellants *Jane* and *Richard*; that the principal money might be laid out at interest, to the uses of the said settlement; and that the trustees might either act in the trusts thereof, or assign the same as the Court should direct.

The respondent answered, and insisted on the marriage articles made upon his father Sir *Kildare Burrow's* marriage with Sir *Walter's* mother *Elizabeth*, dated the 15th of *February*, 1690, and upon a settlement dated the 16th and 17th of *February*, 1693, and that Sir *Kildare* had no power to make such mortgage.

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The appellants replied to avoid the answers being taken for true, but gave notice that no witnesses would be examined on their part, in regard all that was insisted on in the respondent's answer to the last bill, had been in issue in the former pleadings before the decree.

But the respondent examined *Robert Johnston*, who was a subscribing witness to the mortgage deed, and also one *Robert Dixon*, as to the execution of the articles and settlement; who only swore, that they had heard that some articles were entered into before Sir *Kildare's* marriage, but neither of them ever saw them; and that Sir *Kildare* told *Johnston*, they were not executed till after his marriage, tho' they bore date before.

Publication having passed, this cause came to a hearing on the 2d and 4th of *December*, 1724; and altho' objections were made by the appellants counsel to the reading the depositions taken on behalf of the defendant in that cause, because they were examined to a matter which was in issue before the decree; and although no proof had been made, or even attempted to be made, of notice to the said *Thomas Putland*, or any other person acting on his behalf, before the settlement of the premises in question upon his marriage; yet, the following issues were directed to be tried by a jury of the county of *Kildare*; viz. Whether any, and what deed of settlement was executed by Sir *Kildare Burrows* in 1693, of the lands in the mortgage in the pleadings mentioned, or any of them, in pursuance of any and what articles, or for any other and what consideration, and what were the uses of such settlement; and if any such deed or articles were executed, to whom the same, or either of them were come: And whether *Thomas Putland*, sen. *Thomas Putland*, jun. or the trustees in the settlement made on the said *Putland junior's* marriage, or any person or persons that transacted the marriage of the said *Putland*, jun. with the daughter of *John Rotton*, deceased, or any and which

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of them, had notice of such articles or settlement, at the time of the said marriage, or at any other time, and when.

C. Wearg.

T. Lutwyche.

From this last decree, and also from the order for rehearing the cause, the appellants appealed; insisting that it was admitted, that the appellant *John's* grandfather really and *bona fide* lent the respondent's father 3000*l.* at 8*l.* per cent. interest, which was 2*l.* per cent. less than the then common interest in *Ireland*; that for securing the repayment thereof, the mortgage in question was executed; and that this sum, with a great arrear of interest, remained unpaid: The appellant therefore, as an honest creditor without notice, was entitled to all the assistance of a Court of Equity, to compel payment of the money so lent; and the same ought to have been decreed accordingly. That the mortgaged premises, were before the intermarriage of the appellant *John's* father with the appellant *Jane*, and in consideration thereof and of a marriage portion, conveyed to trustees, to the use of the appellant's father, for life; with remainder to the first and every other son of that marriage; so that the appellant *John's* father was a purchaser of the premises in question for a valuable consideration, and therefore ought to have the benefit thereof, in order to recover the money really due; unless it was plainly proved, that the mortgagor had no title to convey, and that the appellant's father had notice thereof before the settlement; for as to the appellant *John*, it was impossible that he could have notice, he being then unborn. That the respondent by his answer to the original bill brought by the appellant's father, and also to the supplemental bill, insisted that his father was only tenant for life of the mortgaged premises, by settlement for a valuable consideration, and had therefore no power to mortgage the same; but though publication was at his desire frequently enlarged, and a commission granted to examine witnesses, yet no proof of such settlement was made; wherefore a decree passed in favour of the appellant's father, and consequently, there was no reason afterwards, to direct an issue to try whether such articles or settlement were executed. That after publication was passed, the cause heard, a decree pronounced, and a bill of revivor brought upon the death of one of the parties, it seemed to be a matter of very dangerous consequence, to allow a defendant to adduce evidence to support the facts of his answer, which were substantially the same as what he had formerly insisted upon, and were

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were fully put in issue in the original cause, but to which he had examined no witnesses therein; and it was the more extraordinary in the present case, because the two witnesses since examined by him, namely, Mr. *Johnston* and Mr. *Dixon*, were not only his uncles, but intimate acquaintance, from whom he might have had the same discovery in the first cause, and who no doubt might have been then examined, had there not been some private reason for delaying such examination, till after publication was passed; especially, since it appeared by the respondent's own bill, that he was informed of these transactions long before, they being all charged in a bill brought by him against the appellant's grandfather and *Sisson*, in the year 1709; and tho' they both answered that bill, and insisted that these two witnesses were privy to the mortgage, and all the transactions relating thereto, yet no farther proceedings were had in that cause, nor any attempt made to examine these witnesses, till after the death both of the appellant's grandfather and father, and of *Sisson* also, who transacted the mortgage in question. But even these witnesses did not prove the articles insisted upon by the respondent, or that either of them were witnesses thereto, or ever saw the original articles, or any copy of them; but only said that they had heard articles were executed, and that they were delivered up to the mortgagee and cancelled. That tho' both the witnesses referred to the answer of *Sisson*, as the reason of their belief touching the articles, and the delivery thereof to the mortgagee; yet they plainly differed from the answer itself both as to the nature of the articles, and the delivery of them to the mortgagee; for the articles, as *Sisson* set them forth, were only a provision for the present maintenance of *Kildare* and his Lady, during the life of Sir *Walter* his father, and for a jointure for the Lady; but contained no limitation to the issue of the marriage, and were, in fact, executed after the marriage. That it seemed very strange, to leave it to a jury to try the limitations of uses in articles, of which no copy was produced, and neither the original, or any copy proved to be extant, nor ever a single witness examined who ever saw them. That the directing an issue, to try whether the appellant *John's* father had any notice of these articles, was apprehended to be contrary to the usual course of proceedings in a Court of Equity; when the party on whom notice is pretended, expressly upon oath, denies having

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having had any notice, and where not the least proof is made to falsify that answer, nor any attempt made to prove such notice. And it was apprehended, that if the appellant *John's* father had no notice of the articles, all the other enquiry would be fruitless and to no purpose. It was therefore hoped, that the decree of the 4th of *December*, 1724, would be reversed, and that the respondent should be decreed to redeem the appellants, or be absolutely foreclosed.

P. Yorke.

C. Talbot.

On the other side it was contended, that the appellants not having thought fit to proceed on the decretal order of *February*, 1718, or to revive the suit in which that order was made; but having exhibited an original bill, and the appellant *John* claiming under the settlement made upon his father's marriage, the respondent was well entitled to examine witnesses in this last cause; and the rather, because the appellants joined issue by replying to the respondent's answer, and because no witnesses were examined in the other cause, before the said decretal order; that cause having been brought on to a hearing without the respondent's knowledge or privity, who was then in *England*; and tho' a counsel opened his answer at the hearing, it was without his knowledge or direction. That it was apprehended not to be unprecedented, to try the limitations and substance of a deed, of which there is no copy extant; and it seemed to be very just and reasonable to do it in this case, there being strong proof that the articles and settlement came to the hands of the appellant's grandfather, and that he destroyed them. That the loss of estates, was not a necessary consequence of losing deeds; for evidence may be given of them, though no copy be extant. That it is agreeable to the known rules of equity, to direct issues to be tried concerning matters of fact, where any doubt remains with the Court; and such issues are often directed upon very slender proofs. That if a title thus contested, should be given away without trial, because the deeds, or copies of them, were not extant, many marriage settlements might be in danger of being destroyed, by the same practices which had been used in this case; as the needy father of a family, by thus getting deeds into his custody, might, to answer present necessities, agree to cancel or destroy them, and thereby ruin his family: Besides, great regard ought to be had to the respondent's being an infant of only eight years old, when the mortgage was made. That the infancy of the appellant *John*,

was conceived not to be very considerable in this case, as he was only seeking to reap the benefit of a wrong done by his grandfather; which, however it might affect his estate, as having covenanted to make good the mortgage, upon the settlement thereof on his son's marriage, yet ought never to fall on the respondent's estate. That fair creditors could never be hurt by the order made in this cause; and to shake settlements in general for the sake of dishonest creditors, who, to carve out a good security to themselves, were capable of a combination to suppress or destroy deeds which stood in their way, ought never to be countenanced in any cause, or upon any consideration. That to direct this trial at law would be no injury to the appellants, if in truth there never were any articles or settlement; and if there were, it might be very injurious to the respondent and his family, not to do it. And therefore it was hoped, that the decree would be affirmed, and the appeal dismissed with costs.

1725.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the said decree of the 4th of *December*, 1724, should be reversed; and that the former cause and proceedings, wherein *Thomas Putland* the appellant *John's* father was plaintiff, and the respondent *Sir Walter Burrows* was defendant, should stand revived, and that the appellants should have the benefit thereof: And it was further ORDERED, that the said Court of Chancery should cause an account to be taken, pursuant to the decree of the 23d of *February*, 1718, of what was due for principal and interest upon the said mortgage; and that the said Court should likewise cause costs to be taxed for the appellants, in the original cause, and on the bill of revivor; and that if the respondent should pay, or cause to be paid, what should be so computed and reported due for principal interest and costs, at such time and place as should be appointed by the said Court of Chancery, the appellants should, at the respondent's charge, reconvey the mortgaged premises to such persons as were entitled to a redemption under the mortgage deed; but, in default of payment of the said principal interest and costs, at the time and place to be appointed as aforesaid, the respondent should be absolutely foreclosed of all equity of redemption of the said mortgaged premises: And it was further ORDERED, that the said Court of Chancery should give proper directions in pursuance of this judgment.

DECREE
reversed
Jour. vol. 22.
P. 483.

Case 11. *Charles O'Hara,* Appellant.
Tully O'Neill, Respondent.

17th April, 1725.

FRANCIS Lord Conway, in consideration of 2000 guineas and 40 broad pieces of gold, making 2199*l.* sterling, paid to him in London by the appellant as a fine; did by indenture of lease dated the 20th of June, 1713, grant and demise the lands of Cloncumber, and several other lands in the county of Leitrim, in Ireland, to the appellant for 41 years, at the rent of 100*l.* per ann.; and the appellant by virtue thereof, entered and continued in the possession of the said lands for some time.

But on the 6th of August, 1714, the respondent filed his bill in the Court of Chancery in Ireland, against the appellant and others, for the benefit of the said lease; alledging, that the same was so taken by the appellant in trust for him.

On the 20th of February, 1716, this cause was heard, when the Court decreed, that the lease was taken in trust for, and for the use of the respondent, and that it should be referred to a Master, to settle an account between the appellant and respondent; and that the appellant should be allowed what money he had paid the Lord Conway on account of the said lease, with interest, and should account with the respondent for the full value of the lands; and upon the respondent's paying the appellant what should appear to remain due of such money as he had paid to the Lord Conway, with the interest thereof, the appellant was decreed to assign over the said lease to the respondent, his executors, administrators, or assigns; and the Master was to give all just allowances to the appellant on the said account.

On the 22d of the same month it was ordered, that the Master should let the said lands to the best bidders; and that the appellant and respondent should join in leases thereof, but that the rent should be paid to the appellant.

Soon

Soon afterwards, the appellant appealed to the House of Lords from this decree and order; and, on the hearing of that appeal, on the 13th of *February*, 1717, it was ordered, that the first clause in the said decretal order, which declared that the said lease was taken in trust for the respondent, should be affirmed; and that the second clause should be affirmed, with the following alteration at the close thereof; *viz.* after the words, "and that he do account with the respondent for the" leave out the words "full value of the said lands", and instead thereof insert "rents and profits of the said lands in manner" "aforesaid." And it was further ordered, that the last clause in the said decretal order should be varied, and stand thus; *viz.* That upon the respondent, his executors or assigns, paying to the appellant, his executors or assigns, what should appear to remain due of such principal money as he paid to the Lord *Conway*, with the interest thereof, the appellant should assign over and deliver up the said lease to the respondent, his executors, administrators, or assigns, by sufficient conveyances in law, free from all acts and incumbrances of the appellant; the respondent giving sufficient security, to be approved of by the Master of the said Court, to indemnify the appellant, his executors, administrators and assigns, from all damages he might any way incur by reason of the covenants in, or his acceptance of the said lease; and if the respondent should not pay to the appellant what should so appear to remain due to him, within six months after the Master's report should be confirmed, the appellant at the same time giving up and assigning the said lease as aforesaid, then the respondent's bill was from thenceforth to stand absolutely dismissed with costs; and that the Master should make all just allowances on the said account; and it was further ordered, that the said order of the 22d of *February*, 1716, should be affirmed.

This judgment was, on the 25th of *June* following, received and made an order of the said Court of Chancery; and the appellant several times afterwards moved the Court, for the benefit of the said affirmed order of the 22d of *February*, 1716, by having the rents paid to him, but the Court refused the same.

The appellant was afterwards served with a summons to attend the Master on the account, but being at that time confined in prison he

1725.

he could not attend, and therefore sent in his charge, and three several commissions for examination of witnesses on the account were granted, two of them to be executed at different places in Ireland, and the third at London; and both parties having joined, those in Ireland were executed, but before the return of the commission to London, the Master proceeded on the account *ex parte*; tho' solicited by the appellant's agents to desist, till the further proofs could be laid before him.

Accordingly, on the 19th of February, 1718, the Master made his report *ex parte*, and therein charged the appellant with several sums with which he ought not to have been charged; and omitted to give him credit for several sums, even for money paid for quit-rent of the lands, and for which the appellant had receipts; and he reported only 2009*l.* 18*s.* 6*d.* due to the appellant, for principal and interest of the fine of 2000 guineas and 40 broad pieces of gold, paid by him to the Lord Conway.

On the 26th of the same month, the report was confirmed; but the respondent, in order to gain more time than the six months limited by their Lordships for payment of the money, after the report should be confirmed; moved again, on the 18th of April, 1719, for a confirmation of the report, unless the appellant should lodge exceptions in two days.

The appellant accordingly took six several exceptions to the said report; first, for that the Master had not taken notice of the appellant's charge laid before him, or that there had been a commission to London to prove the same; or that the appellant's agent had insisted, that the said commission was not returned, and desired the Master would defer his report till the return thereof. The second exception was, for that the Master had charged the appellant with the whole rents, tho' a great part thereof remained in arrear; and the third, fourth, fifth and sixth exceptions were, for that the Master had not given the appellant the proper allowance for the said fine and other money paid the Lord Conway in England, and paid and expended by the appellant in England, on account of the said lease; the Master having computed by the difference in guineas only, tho' exchange was then above 12*l.* per cent.; nor had the Master made any allowance for money paid by the appellant

tant, for the quit-rent of the lands, nor for the money expended by him in defence of several suits concerning the said lands, and in raising the said fine: All which sums were given in the appellant's charge, and were to be allowed him by their Lordships said order.

1725.

On the 8th of May, 1719, the cause was heard on the said report and exceptions; when, tho' the appellant's counsel prayed that the account might be referred back to the Master, that so the appellant might have an opportunity of laying his proofs before him, yet the Chancellor was pleased to over-rule all the appellant's exceptions, and to confirm the report; and ordered, that the Register should compute the interest of the principal money to the said 8th of May, 1719, which amounted to 31*l.* 12*s.* 6*d.* and being added to the said balance of 2009*l.* 18*s.* 6*d.* reported due, made 2041*l.* 11*s.* 0*d.* out of which the costs of the suit were to be deducted. And it was further ordered, that the appellant should assign over and deliver the said lease to the respondent, his executors, administrators or assigns, or to *Brinsley Butler*, Esq; by sufficient conveyances in the law, free from all acts and incumbrances of the appellant; the respondent at the same time giving the appellant sufficient security, to be approved of by the Master, for his indemnity on account of the said lease; and should also then pay to the appellant the said sum of 2041*l.* 11*s.* 0*d.* first deducting the costs of the suit. And it was also ordered, that the respondent should, within six months, accept of the said assignment, and pay the appellant the said 2041*l.* 11*s.* 0*d.* deducting the said costs; or in default thereof, the respondent's bill should thenceforth stand absolutely dismissed with costs.

The appellant being still in confinement, was, on the 22d of August following, served with a copy of a writ of execution of this decree; and at the same time the respondent tendered an engrossed parchment writing, importing an assignment of the said lease to *Brinsley Butler*, and also shewed the respondent some bags of money, which he said was the consideration money mentioned in the said writing, and offered to pay the same, if the appellant would then execute the deed; but the appellant not having previously read, or seen the said deed, or any draft or copy thereof, nor he, or any person on his behalf, having been advised with in preparing and settling the

1745. same, or any draft thereof, as in such case is usual; and the appellant observing, that several improper covenants on his part were inserted therein, and also that no allowance was made for the interest of the money decreed due to the appellant, from the 8th of *May*, 1719, to which time the said interest had been computed, being 127 days; as also, that 22*l.* 16*s.* had been deducted out of the said money on account of costs, tho' the appellant was not served with any bill of costs; he, for these reasons, refused to execute the deed, and insisted, that the respondent ought to indemnify him from all damages on account of the said lease, which he had not done; but the respondent refusing to pay the money, unless the appellant would execute the deed, went away abruptly; and he, or any person on his behalf, never afterwards paid or tendered one farthing of the money, tho' he then was, and for about three years before had been in the possession of the lands, and enjoying the full benefit of the lease.

On the 27th of the same month of *August*, the Lord Chancellor ordered that an attachment should issue against the appellant, and that the interest of his money should cease from the time of the tender, unless cause shewn in ten days: Accordingly the appellant, on the 17th of *September* following, shewed for cause the irregularity of the tender; but his Lordship was pleased to order, that an attachment should issue against the appellant, unless he should execute to the respondent an assignment of the lease in ten days, without further motion. And on the 8th of *October*, 1719, this last order was made absolute, and the appellant was accordingly charged with an attachment; and it was then also ordered, that the interest of his money should from thenceforth cease.

The appellant afterwards finding that several lands, not belonging to the Lord *Conway*, but the estates of other persons, were inserted in the deed of assignment so tendered to him, moved the Court on the 24th of *February*, 1720, to set aside the said several orders of the 27th of *August*, the 17th of *September*, and the 8th of *October*, 1719; but this motion, tho' supported by several affidavits, was refused, and all the said former orders were affirmed.

1785.

The appellant, on the 14th of December, 1723, moved the Court again to discharge the said orders and also the attachment, that so he might at least have his liberty; but his Lordship still denied the appellant any relief, and also refused to suffer the aforesaid affidavits, and several other proofs and papers then offered by the appellant's counsel to be read.

And therefore, from the Master's report and the confirmation of it, and also from the several subsequent orders and proceedings, the present appeal was brought; and on behalf of the appellant it was insisted, that the Court, on several applications, had constantly refused him the benefit of the order of the 22d of February, 1716, which had been affirmed on the former appeal; and that the Master had not by his report, made the appellant all the allowances which he was justly entitled to, but had proceeded on the account irregularly, without giving the appellant any opportunity of proving the several articles of his charge; that the pretended tender was only conditional, if the appellant would execute the assignment to the said *Brinsley Butler*, which neither he, or any person on his behalf, had ever before seen or read; and which also imported to be an assignment of lands belonging to other persons, and not to Lord *Conway*; nor was there any increase made in the consideration money of that deed, for the interest of the appellant's money from the decree of the 8th of May, 1719, to the time of the said tender, as there ought to have been; and the deed moreover contained several very unfair and improper covenants on the part of the appellant. That the respondent did not at the time of the tender, or at any other time, offer to the appellant any sufficient security for his indemnification in respect of the lease; nor had he since tendered to the appellant one penny of his money, or given him an opportunity of executing a proper assignment of the lease; altho' the respondent was in the full enjoyment of the lands, and in possession of the money also, for which, by the order of the 8th of October, 1719, he was to pay no interest; while the appellant was deprived of his liberty, by being confined upon the attachment.

C. Wearg.

C. Talbot.

On the other side it was said, that the respondent had done all that he was obliged to do, in compliance with the order made on the former appeal, and to enforce the execution thereof;

P. Yorke.

T. Lutwyche.

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of; having, for that purpose, raised 2000*l.* for which he still paid interest. And as it appeared, that the appellant had never offered to execute an assignment of any kind, or taken any one step towards complying with the said order; it was hoped, that the several orders complained of would be affirmed, and the appeal dismissed with costs.

ORDERS
reversed.
Jour. vol. 22.
p. 506.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the Master's report and the order of the 26th of *February*, 1718, confirming the same, should be confirmed; save and except that the Master should review his report, in relation to the value of the exchange of the purchase money paid by the appellant to the Lord *Conway*, and see whether he had allowed the appellant the full value of the exchange, as it stood at the time of the said payment, and if he had not so done, to do it; and that he should also review the taxation of costs to the respondent, and allow what was reasonable and just: And it was further ORDERED and ADJUDGED, that all the orders and decrees of the said Court of Chancery, subsequent to the said order of the 26th of *February*, 1718, should be set aside and reversed, and particularly the order for an attachment against the appellant; and the said Court was forthwith to cause him to be discharged from his commitment on the said attachment, without payment of any fees: And it was further ORDERED, that the said Court of Chancery should direct the Master to approve of the draft of an assignment, to be made by the appellant to the respondent, pursuant to the order and judgment of the House on the former appeal; and also to approve of the security, to be given by the respondent to the appellant for his indemnity; and after the approbation of such assignment and security by the said Court, to appoint a place and time, not exceeding three months, for the executing such assignment and giving such security; and the Master was to carry on the interest due to the appellant from the time to which it was last computed, home to the time of executing such assignment; and out of the principal money and interest that should be so computed due to the appellant, the costs decreed to the respondent were to be deducted; and that on the respondent's payment to the appellant, of what should be so due to him, after such deduction, and giving such security for indemnity as aforesaid, the appellant was to execute the said assignment to the respondent; and that

that the said Court of Chancery should give such proper directions in pursuance of this judgment, as should be just.

John Stapleton, Esq; Plaintiff } Case 12.
Henry, Lord Shelburne, Defendant } in Error.
 26th April, 1725.

IN Trinity term, 1721, an action of debt for 2800*l.* was brought by the plaintiff against the defendant in the Court of Common Pleas; and the plaintiff by his declaration set forth, that by deed dated the 17th of September, 1720, it was witnessed, that he had sold the defendant 200*l.* *South-sea* stock; and covenanted, that upon the tender and payment by the defendant of the sum of 1360*l.* on or before the day of shutting the Company's transfer books, in order to make the *Christmas* dividend; he, the plaintiff, would transfer to the defendant the said 200*l.* *South-sea* stock, and permit him to receive all future dividends and advantages, which should be allowed by the Company on that account. And the defendant, in consideration of the premises, covenanted that he would, upon or before the said day of shutting the Company's transfer books, in order to make the *Christmas* dividend, accept, or cause to be accepted, the said 200*l.* stock from the plaintiff, and then also pay therefore *proinde* the sum of 1360*l.* Provided, that if the defendant should refuse to accept and pay for the said stock, it should be lawful for the plaintiff to dispose of it at the then market price; and out of that money, pay himself the said 1360*l.* returning the overplus, if any, to the defendant: But if the money arising by such sale should prove insufficient to satisfy that sum, then the defendant was to make good the deficiency to the plaintiff, upon demand; and for the due performance of this agreement, each party bound himself to the other, in the penal sum of 2800*l.* — That the plaintiff had truly performed all the covenants and agreements in the said deed, on his part to be performed; but that the defendant had not performed the agreement on his part. — That the Company's transfer books continued open till the 23d of De-

8 Mod. 292.
 Viner, vol. 6.
 p. 438. ca. 7.
 vol. 20. p. 5.
 note to ca. 14.

1725.

December, 1720, and then were shut in order to make the Christmas dividend, of which the defendant had notice. That the plaintiff, for the space of an hour before the shutting of the said books, was at the Company's office called the South-sea house, and was all that time ready to transfer the said 200*l.* South-sea stock to the defendant, and offered so to do, and to permit him to receive all the dividends and advantages allowed by the Company on account thereof, after the date of the said deed: But the defendant, or any on his behalf, was not there, in any part of that hour, to receive the transfer of the said 200*l.* stock. That the defendant at any time after making the said deed, or before the day of shutting the said books, or upon that day, did not tender or pay the said sum of 1360*l.* to the plaintiff, or any part of it; altho' the plaintiff was ready all that time to transfer to him the said 200*l.* stock. The plaintiff then averred, that on the said 23d of December, 1720, after the shutting the said books, he sold the said 200*l.* stock at the then current market price for 322*l.* and no more; and received that sum towards satisfaction of the said 1360*l.* and then requested the defendant to pay him 1038*l.* to make up the deficiency of the said 1360*l.* according to the intent of the said deed; but that the defendant had not paid the said 1038*l.* whereby the plaintiff was entitled to recover the said penal sum of 2800*l.*

To this declaration the defendant pleaded, that after the sale of the 200*l.* stock, he enfeoffed the plaintiff of 100 acres of land in Myton; which he accepted in full satisfaction of the said sum of 1038*l.* in the declaration mentioned.

The plaintiff demurred to this plea; and for special cause of demurrer shewed, *inter alia*, that the defendant had not made a full defence.

The defendant having joined in demurrer, the case was argued in the same term before the Court of Common Pleas; when the only question was upon the declaration, whether the plaintiff had entitled himself to the 1360*l.*? And that Court were of opinion, that he had not: For, as the money was to be paid for the stock, it was necessary for the plaintiff to shew, that he had made a legal tender of the stock before he could claim the

the money, which he had not done in this case; for he only said, that he was at the *South-sea* office for an hour before the shutting of the books, and then and there offered to transfer the stock to the defendant; whereas, he ought to have set out the manner of transferring stock, and the time and place when and where it was usually transferred; which the Court could not take notice of judicially: And therefore, as it did not appear upon the record that the tender was a sufficient tender, judgment was given for the defendant.

1725.

Whereupon, the plaintiff brought a writ of error in the Court of King's Bench; and upon arguing the case there, in *Michaelmas* term 1724, the Court were of opinion, that the covenants were mutual and independant; and tho' the tender was not well alledged, yet the plaintiff was entitled to the money, because he was not under a necessity of making a tender; and therefore reversed the judgment of the Court of Common Pleas, and gave judgment for the plaintiff.

The defendant therefore brought a writ of error in Parliament to reverse this latter judgment; and on his behalf it was argued, that he having agreed to pay the money for the stock, it ought to have been transferred, or at least tendered to him, before he was obliged to pay the money. That the plaintiff had not sufficiently alledged a tender of the stock to the defendant, for the Courts of law could take no notice of any fact but what was alledged upon the record; but the record did not alledge, either that the usual place for transferring stock was the *South-sea* house, or the usual time before the shutting of the books; and consequently it did not appear to the Court, that a tender at that place and time, was a good tender. That although it should be admitted, that where a contract or agreement is made and one party undertakes generally to perform his part, and the other party in like manner to perform his, each party may have a remedy against the other, without any special averment that the plaintiff has done what was to be performed by him; yet on the other hand, it must be admitted to be the known and settled resolution of law, that where one side undertakes to do a thing in consideration of, or upon the previous performance of what is to be done by the other, this is in the nature of a condition precedent; and he who is to do the previous act, cannot maintain an action against the other for his failure,

C. Wearg.

J. Comyns.

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failure, without averring that he hath performed what ought to be previously performed by him. If therefore, a proper and legal tender of the stock was necessary in order to entitle the plaintiff to the money, if such tender could not otherwise judicially appear than by full and sufficient averment; and if the averment in this declaration was in itself defective and insufficient, as was agreed by both Courts; it was hoped, that their Lordships would not enforce an action of this nature, beyond the stated and prescribed rules of law; but would reverse the judgment of the Court of King's Bench, and affirm that of the Common Pleas.

P. Yorke.

N. Fazakerley.

On the other side it was contended, that the articles contained mutual covenants; and therefore it was not necessary for the plaintiff in the action to alledge either a transfer or tender, to entitle him to recover for the non-payment of the money, that not being a condition precedent to the payment thereof. That supposing it necessary to alledge a tender, such tender was sufficiently alledged; but if not, the defendant in the action had aided that defect in the declaration, by pleading a collateral matter; whereby he had put himself upon a defence, which amounted to a full admission of a tender. And therefore it was hoped, that the judgment of the Court of King's Bench, would be affirmed with costs.

JUDGMENT
reversed.
Jour. vol. 22.
p. 518.

BUT after hearing counsel on this writ of error, it was ORDERED and ADJUDGED, that the judgment given in the Court of King's Bench, reversing the judgment given in the Court of Common Pleas, should be reversed.

John

John Ward, Esq; - - Appellant. Case 13.

Edmund, Duke of *Buckinghamshire* and
Normanby, an Infant, *Charles*, Earl
of *Orrery*, *George*, Lord *Willoughby*
de Brooke, *Thomas*, Lord *Trevor*, } Respondents.
Allen, Lord *Bathurst*, and *Patrick*
Garden, Esq; Executors of the late
Duke, and Trustees in his Will,

4th May, 1725.

JOHN Duke of *Buckinghamshire*, being seised of an estate in tail male in the manor of *Mulgrave*, and divers other manors, lands, tenements and hereditaments, and several allum mines, or allum works with their appurtenances, in the county of *York*; by articles dated the 26th of *February*, 1703, agreed to demise to *William Ward* the appellant's father, and the appellant, the said estate and allum mines for the term of eight years and an half, from *Lady-day* 1704, under the yearly rent of 2379*l.* in money, and 740 tons of allum, at the prices therein mentioned: And he also agreed to bargain and sell to the said *William Ward* and the appellant, all his stock of allum, with the materials and utensils for making of allum, then remaining in and upon the said allum works and premises, and that a schedule should be taken thereof and annexed to the intended lease; and the lessees agreed, at the end of the lease, to leave and deliver up to the Duke, his heirs or assigns, as large and good a stock of allum, &c. on the premises, as should be mentioned in the said schedule; and that they would likewise execute a bill of sale thereof gratis, to the Duke and his heirs.

Accordingly, a schedule was soon after taken, and dated the 16th of *March*, 1703, of all the allum, &c. on the premises, and delivered to the said *William Ward*; and pursuant to the articles, the Duke executed a lease of the premises to him, and the appellant and *Joshua Ward* his brother, for the said term

1725.

term of eight years and an half, under the said yearly rents and covenants; and the said schedule was annexed to the lease.

About two years afterwards, the appellant persuaded the Duke to accept of a surrender of that lease, and grant them a longer term; and thereupon the Duke, by indenture dated the 23d of *March*, 1705, demised to the said lessees the estate, allum mines, works, &c. from *Lady-day* 1706, for 19 years, under the like yearly rents in money and allum; and he did thereby bargain and sell to the lessees, all the stock of allum, coals, kilp, lead, iron mine burnt and unburnt, fats, furnaces, coppers, coolers, tools, utensils, stores, implements and things belonging to the Duke, which then, or on the 25th of *March*, 1704, were, or at any time since had been remaining in and about the said allum works and other the premises; with an exception in these words, *viz.* "excepting all or any quantity of rock, or mine, at present lying in any storehouse there, quite finished and made into allum fit to be sold, or shipt away." Which said stock and premises, except as before thereby sold, was expressed and set forth in a schedule or inventory thereunto annexed. And the lessees on their parts, among divers other covenants, did covenant to deliver up to the Duke, his heirs and assigns, the allum works and premises in good condition at the end of the term, and to deliver up as large and as good a stock of allum made, and materials, utensils and things, in and upon the allum works, as were mentioned in the schedule to the said lease annexed; and to execute a bill of sale *gratis*, to the Duke and his heirs, for his and their benefit.

The interest in this lease was afterwards vested solely in the appellant, but that the Duke might be certain, at the expiration of the second lease, of having all the particulars comprised in the schedule delivered up to him, the same schedule taken the 16th of *March*, 1703, was annexed to the second lease made the 23d of *March*, 1705; and according to that lease, and by virtue thereof, the lessees continued in the possession of the premises, and of the stock of allum, utensils and other things mentioned in the said schedule; and were constantly in the possession thereof, till the expiration of the said second lease.

The

The Duke had for several years, intrusted and employed the appellant in considerable transactions, for great sums of money; and in the year 1717, he desired an account might be settled between them. The appellant having accordingly made up his accounts, there appeared in one article a gross error, relating to a sum of 9684*l.* to clear which, the Duke appointed a day to have the appellant's books inspected; but on that day, the appellant pretended that all his books of account, and several receipts from the Duke, relating to the payment of several sums of money, had been just before stolen out of his counting-house; whereas the Duke denied that he had received any of the sums which the appellant pretended to have paid, and thereupon brought his bill in Chancery against the appellant, to compel him to come to a fair account. To accommodate which suit, the appellant proposed to pay the Duke 10,000*l.* And although there was at that time very large sums due to the Duke; yet, to get rid of the appellant, and to be released of certain agreements of copartnership which had been made about five years before, and were then subsisting, the Duke agreed to take that sum, and a release of the copartnership; and general releases were accordingly executed of all matters between them, except the lease of the estate and allum works.

Among many other particulars in the schedule annexed to that lease, was an item in the words and figures following; viz. "315 tuns and a quarter of allum in several storehouses, "at 112 pounds and a half to the hundred weight." — And at the bottom of the said schedule, a memorandum was made that the 16th of *March*, 1703, possession of the premisses and utensils, with the stock of allum, was given to, and accepted by the said *William Ward*.

On the 24th of *February*, 1720, the Duke died; leaving the respondent the Duke, his son and heir, of very tender years; and having made his will, and appointed the other respondents his executors and trustees, and upon his death the premises in lease to *Ward* descended to the infant Duke.

The second lease being near expiring, and the appellant having in many instances broken several of the covenants, particularly by having entirely neglected one of the allum mines, and totally demolished it, and having cut down and destroyed

great

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great quantities of timber trees, and lopped and topped divers others, and threatening to commit other waste, and strip the estate of all the underwood, and pull down the several houses that were built upon the premises; and the appellant making no provision, to deliver up the stock of allum, utensils, implements and other things, at the end of the lease, particularly the 315 tuns and a quarter of allum mentioned in the said schedule, or to perform the other covenants and agreements; the respondents, the executors and trustees, and the appellant had, in the beginning of the year 1724, several meetings, in order to persuade the appellant to do justice to the infant Duke, and to perform all the covenants and agreements in the lease, according to the true intention of it; but the respondents perceiving their endeavours would be fruitless, and that the appellant's intention was to evade coming to any final determination, that so the lease might be expired before he did any thing; they therefore thought themselves bound in duty to bring a bill, and one was accordingly brought in the Court of Chancery, in the infant Duke's name and their own, against the appellant, for a specific performance of the covenants in the lease; and in such bill, the demand of having the 315 tuns and a quarter of allum delivered to the respondents, was particularly made and insisted on.

The appellant in his first answer, admitted the making the last lease and the schedule, and that the lessees possessed the stock of allum and other things mentioned in the schedule annexed to the said lease, except as after mentioned; and that they had been in possession and enjoyment of the demised premises, ever since the making the lease; that the schedule to the second lease, was the same as the schedule annexed to the first lease; he also admitted, that by the terms of the lease, he at the expiration of the term was obliged to deliver up to the Duke and his heirs, the stock of allum and other things in the lease and schedule thereto annexed mentioned, and all houses, edifices and buildings belonging to the premises. But in relation to the 315 tuns and a quarter of allum, he conceived, that the same quantity of allum ought not be left upon the premises, for the benefit of the respondents at the end of the term; for that it was the apparent intent, purport and true meaning of the lease, that the lessees should leave, surrender and yield up, to the Duke and his heirs, as large and good
a stock

a stock of allum made, coals, kilp and other things, as the late Duke did bargain and sell by the lease to the lessees; and he insisted, that by virtue of the exception in the lease, the quantity of 315 tuns and a quarter of allum was excepted and reserved out of the grant, bargain and sale, thereby made to the lessees, of all the stock of allum, coals and other things.

On the 2d of *March*, 1724, the cause was heard before Sir *Jeffery Gilbert* and Sir *Robert Raymond*, two of the Lords Commissioners for the custody of the Great Seal; when the appellant departed from what he had insisted on in his answer, viz. that, by the construction of the lease, the 315 tuns and a quarter of allum was not at all to be delivered; and, to the respondents very great surprize, started up a pretence, that by a paper, which he then proved only as an exhibit, it appeared that a great quantity of allum had been formerly delivered to the Duke, and that these 315 tuns and a quarter were part thereof; so that the late Duke had many years ago received this quantity of allum, which was to be delivered only at the expiration of the lease: But the Court upon inspecting this paper, and observing the same to be rased in several places, and the appellant not having insisted thereon, or on the delivery of the allum in any of the pleadings, which if true was impossible to have been forgot; but, on the contrary insisting, that it never was intended to be delivered; were of opinion, that no regard ought to be had to the said paper; and therefore it was ordered and decreed, that the appellant should at the expiration of the lease, leave upon the premises 315 tuns and five hundred of allum, ready made and quite finished, at 112lb. to the 100 weight; together with such other stock of allum made, coals, kilp, mine burnt and unburnt, fats, furnaces, coppers, coolers, lead, iron and other utensils, stores, implements and things, as were mentioned in the schedule to the said lease annexed; and if any of them were not remaining in specie, that he should leave others as good, in the room thereof; and should execute a bill of sale to the respondents, according to his covenant in the lease; and that the appellant should, at the expiration of the lease, leave the premises in good order, and deliver quiet and peaceable possession thereof to Mr. *George Prifwick*, named receiver to the infant Duke; and should at the same time deliver to him, in specie, the said 315 tuns and one quarter of allum, together with the other things as aforesaid.

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After pronouncing this decree, and notwithstanding the appellant, by his clerk in Court, had joined in a petition to bring the cause on, and attended the hearing thereof in person; he informed the Register of the Court and the respondent's solicitor, that he would and did insist on his privilege as a Member of the House of Commons; and thereupon, lest the lease should expire before the appellant could be obliged to perform the covenants, a petition was preferred to the House of Commons, and by an order of that House it was resolved, *nemine contradicente*, that the appellant had waived his privilege, and should not resume the same.

J. Willes.

W. Lee.

He therefore appealed from the decree, insisting, that all allum in any store-house quite finished, was excepted out of the second lease, and reserved to the Duke; and that the 315 tuns 500 pounds of allum mentioned in the schedule to be in store-houses, appeared to be allum quite finished, as well from the proofs in the cause, as from the adjudication in the decree, whereby the appellant was decreed to deliver that quantity of allum quite finished. That the late Duke, at the time of making the second lease, had no other allum quite finished, but the 315 tuns 500 pounds. That it appeared by the evidence in the cause, that these 315 tuns 500 pounds of allum, were, pursuant to the agreement, delivered to the Duke, or his agents, upon, or very soon after the making of the second lease; and therefore it could not be the intention of the parties, that the appellant should, at the end of the term, leave more stock upon the premises, than he found thereon when he entered. That the covenant to redeliver at the expiration of the second lease, all allum made, &c. might be very well satisfied, without admitting the construction which the respondents endeavoured to put upon it; for that construction was not only contrary to the plain intention of the parties, but inconsistent with the tenor of the other parts of the lease. That on the 31st of *March*, 1706, which was only six days after the commencement of the second lease, the lessees delivered at the scale, to the use of the Duke, 975 tuns and a half of allum, which was certified by *Ambrose Newton*, in the words following, viz. "*Sandsend, April 11, 1706. These are*
 " to certify the most noble the Duke of *Buckingham*, and his
 " Grace's agents, that since the 538 tuns I certified to be
 2 " weighed,

“ weighed, and remaining in the several warehouses in *Sandsend*,
 “ there are 437 tuns and a half more, being in all 975 tuns
 “ and a half of allum, resting the 31st day of *March* last in
 “ the several warehouses at *Sandsend*, of which, as it was
 “ weighed, an account was taken by me, *Ambrose Newton*.”

And on the back of this certificate, the Duke gave an order to the appellant in the following words, viz. “ Mr. *John Ward*,
 “ I hereby order you to charge the quantity of six hundred
 “ and sixty tuns and one quarter of allum to my account, part
 “ of the quantity here mentioned in this certificate, and out of
 “ the money arising by the sale of allum in your hands, pay
 “ to Mr. *William Ward* and yourself 10*l.* for every tun, accord-
 “ ing to agreement, and for your so doing, this shall be your
 “ discharge. *April 30, 1706. BUCKINGHAM.*” By which
 certificate and order indorsed thereon, it appeared, that the
 315 tuns 500 pounds of allum in the storehouses quite finished,
 which had been received by the lessees upon the first lease,
 were redelivered. But should it be objected, that this certi-
 ficate and order were not insisted on by the appellant in his
 answer; it was true, they were not, because he did not discover
 the order, till after his answer was put in, nor even till after
 the commission for the examination of witnesses was executed.

On the other side it was contended, that the decree was just, C. Wearg.
 and ought to be affirmed; it being admitted, that the appel- C. Talbot.
 lant and his partners did, so long ago as 1703, as appeared by
 the schedule, receive the 315 tuns and a quarter of the late
 Duke's allum; and as they for so many years had the benefit
 and produce thereof, and the interest of the money for which
 the same was sold, it was but reasonable, that the appellant
 should return the like quantity of allum, according to his
 express agreement. It was also admitted, that the respondents
 were entitled to have all the other particulars mentioned in the
 schedule, delivered to them; and there being no pretence to
 separate or distinguish this *item* of allum from the rest of the
 articles, it ought therefore to be delivered; but the value of it
 being much greater than the rest, made the appellant more
 desirous to entangle and perplex it. That there was no evidence,
 nor even the least foundation to imagine, that the late Duke
 ever agreed, that this quantity of allum should be excepted
 out of the new lease, or that he should have the same imme-
 diately delivered to him. And the pretence, that the reason
 why

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why the schedule to the first lease was annexed to the second, was only to avoid the trouble and expence of making a new schedule, was a vain and frivolous imagination; since if the same was true, and if the 315 tuns and a quarter of allum were delivered, or intended to be delivered to the Duke at the execution of the second lease, this article being greater in value than all the rest, might either have been struck out of the schedule, or any agreement relative thereto, might have been plainly expressed in the second lease itself.

DECREE
affirmed.
Jour. vol. 22.
p. 530.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of, affirmed; and that the appellant should pay, or cause to be paid to the respondents the sum of 100*l.* for their costs, in respect of the said appeal: And it was further ORDERED, that all the written evidence produced at the bar by the appellant, and particularly a paper, purporting to be a certificate or order of the late Duke of *Buckinghamshire* and *Normanby*, should be delivered over by the Clerk assistant to the Register of the Court of Chancery: And the House observing many rasures and other violent suspicions of forgery in the said paper, it was further ORDERED, that his Majesty's Attorney-general should prosecute the appellant for the same, in such manner as he should think fit; and that the papers and writings above ordered to be delivered over into the Court of Chancery, should remain there, to be made use of in the said prosecution, in such manner as the Attorney-general should think fit; and, that in the mean time, each party, their agents and solicitors, should have liberty to resort to and peruse the same, in the custody of the said Register*.

* By a manuscript note upon this case, in Mr. *Bicknell's* collection, it appears, that the appellant was accordingly tried for this forgery; and, being convicted, stood in the pillory before the gate of *Westminster-hall*.

Richard

Richard Stone, Esq; - - Appellant. Case 14.

Arthur Earl of Anglesey, Arthur Lord Altham, Richard Bayley and Charles Annesley, Esqrs. } Respondents.

5th May, 1725.

THE respondent the Earl of *Anglesey* being, as he declared, seised in fee simple or fee tail of a parcel of inclosed ground, called *Camolin* park, formerly and before the same was inclosed, known by the name of *Knockangarrow*, in the county of *Wexford*, on which there were standing a great quantity of timber and other wood; and being disposed to sell such timber and wood, the appellant treated with him for the purchase thereof; and in consequence of such treaty, the Earl, by deed dated the 20th of *August*, 1719, agreed to sell the said wood to the appellant for the sum of 5000*l.* and to give him seven years time for the cutting and carrying it away.

The appellant afterwards, and in order to dispose of the timber again, treated with several persons for the sale thereof; but the respondents the Lord *Altham* and Mr. *Bayley*, with a design to prevent the appellant's disposing of the woods, gave out, that the Earl was but tenant for life of the same, and therefore had no power to sell. They also pretended, that the Lord *Altham* was seised of a remainder in tail of the said premisses, and that *Bayley* had bought all the said wood from the Lord *Altham*; and they both threatened that they would hinder any vendee from cutting or carrying away the wood, and would get the injunction of a Court of Equity for that purpose.

Whereupon the appellant exhibited his bill on the 25th of *January*, 1719, in the Court of Chancery in *Ireland* against the respondents, praying, that the Earl and the other defendants might discover and set forth their respective titles to the premisses; and if it should appear, that the Earl had a good title to, and could sell and dispose of the said woods, then that the appellant and his vendees might be quieted therein against the respondents Lord *Altham*, *Bayley* and *Annesley*; but if the Earl

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should not make out a good title to the woods, then that the appellant might be released and discharged from his purchase.

The Earl, by his answer to this bill, admitted the agreement with the appellant; and said, he was willing to perform the same: And as to his title, he insisted, that he was seised in fee of the premises; for that his grandfather *Arthur* Earl of *Anglesey* being seised in fee thereof, did, on the marriage of his son *James* Earl of *Anglesey*, settle the same on his said son for his life, with remainders to the sons of that marriage successively in tail male; and that the said *James* his father had three sons, *James*, afterwards Earl of *Anglesey*, his first son; *John*, late Earl of *Anglesey*, his second son; and the respondent *Arthur*, now Earl of *Anglesey*, his third son: That the said *James*, the first son, died without issue male, whereby the Lands descended to *John*, the second son; who being so seised, suffered a common recovery, and being by virtue thereof seised in fee, devised the lands to the respondent *Arthur* Earl of *Anglesey*, his brother; and therefore insisted, that the appellant should perform the agreement.

The respondent Lord *Altham* by his answer alledged, that the said *James* Earl of *Anglesey*, the respondent Earl *Arthur*'s elder brother, did, by his will, devise the said lands to Earl *Arthur* for life, with contingent remainders in tail to all his sons, with a remainder in tail to the respondent Lord *Altham*; and he insisted, that the appellant had no better title to the lands, than Earl *Arthur* had, who was but tenant for life, subject to impeachment of waste.

The respondent *Richard Bayley* by his answer insisted, as the Lord *Altham* had done, that the appellant had no right to the woods, for that Earl *Arthur* was but tenant for life, subject to impeachment of waste; and that the Lord *Altham* being tenant in tail of the premises, had, by deeds of lease and release, conveyed the same to him, and had sold him the said woods.

The other respondent *Charles Annesley*, by his answer said he believed, that *James* late Earl of *Anglesey* was seised in fee of the premises, and devised the same to the respondent the Earl for life, with remainder to all his sons successively in tail male; and

and for want of such issue, to the respondent the Lord *Altham* for life, with like remainders to his sons successively in tail male; and for want of such issue to *Charles Annesley*, uncle of the said Earl *James* for his life, with like remainders to all his sons successively in tail male; and that he was the first son of the said *Charles Annesley* who was dead.

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The cause being at issue, witnesses were examined on behalf of the appellant, and of the respondents the Earl and Lord *Altham*.

The appellant proved his agreement with the respondent the Earl; and he proved the settlement set forth in his answer, to have been made by his grandfather; that the said *James* Earl of *Anglesey* his brother died without issue male; and that *John* Earl of *Anglesey* thereby became seised, and suffered a recovery of the lands whereon the woods grew, and by his will devised the same to the respondent Earl *Arthur* and his heirs. But the respondent Lord *Altham* did not make any proof of a title in himself to the premises, as he had alledged by his answer.

On the 1st of *July*, 1724, the cause was heard before the Lord Chancellor; when his Lordship having heard the pleadings opened, and the proofs read, and what was offered by counsel on all sides, was pleased to take time to give his judgment.

And on the 14th of *November* following, his Lordship was pleased to declare, that the appellant's purchase appeared not to be real, but only colourable, in order to try the other defendants title in equity, which could not be done, being properly at law; and therefore decreed, that the appellant should be at liberty to make use of, and give in evidence, the depositions taken in the cause, (which were depositions taken on the behalf of the Earl of *Anglesey*) against the defendants the Lord *Altham*, *Bayley* and *Annesley*, to shew that *Knockangarrow* were the same lands with *Camolin* park: But as to the rest of the bill, that it should be dismissed against those defendants with costs. And as to that part of the bill which sought to stop the respondent the Earl from recovering the purchase money, his Lordship decreed, that the bill should be dismissed with costs.

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From this decree the appellant appealed, because the ground assigned by the Lord Chancellor for dismissing the bill, was, that the appellant's title was properly triable at law; whereas, the appellant had no grant in law of the woods, and could therefore make no defence to any action which might be brought for any of the wood he should cut; neither had he any of the family deeds or writings, to shew the title of the Earl of *Anglesey*, under whom he claimed. That should the appellant have cut down the wood, without knowing the right he had to it, he would subject himself to an action, which might be brought after the Earl's death, and when he could not have the aid of the Earl to make out his title, if he had one; and if his Lordship's title to the wood was not good, the appellant could have no remedy for recovering the money he had paid, in case his Lordship should not leave assets, and even if he did, it might be difficult to find them. That the prayer of the bill was conceived to be just; for if the Earl had sufficient power to sell the woods, it was against conscience for the Lord *Altham* and the other respondents to set up groundless pretensions, in prejudice of the appellant's right under the Earl; and if, on the other hand, the Earl had no power to sell the woods, it was but reasonable that he should relinquish any claim to the purchase money; and not force the appellant to pay the money, and have him engaged in a law-suit, which might eventually ruin him: It was therefore highly necessary for the appellant, before he proceeded to cut the wood, to know what right he had to it; and this he could not do, otherwise than by a suit in equity. If the Lord Chancellor had been of opinion, that this right to the wood ought rather to have been tried at law than in equity, his Lordship might have ordered the appellant to have cut a tree, and the parties who alledged they had the property in it, to have brought an action within a limited time; and on failure, to have granted the appellant a perpetual injunction against them: Or, he might have directed an issue, to try whether Earl *James*, the brother of the respondent Earl *Arthur*, had power to devise the lands on which the woods grew; so that it might thereby appear, whether Earl *Arthur* was tenant for life only, or not. As to the objection, that the appellant was no real purchaser, but that his agreement was colourable only, and that therefore the Court should do nothing to aid him; it was answered, that there

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there was no proof in the cause, on which to ground any such surmise: The agreement did not import that any money was paid, and therefore it could not be incumbent upon the appellant to prove the payment of any money; but having proved the execution of the deed, he had done all that was necessary in the cause. Admitting, however, that this suit was really brought to try the Earl of *Anglesey's* right to cut the woods, it was conceived that there was no just reason to dismiss the bill; for since the Earl had an intention to cut the wood, and it was disputed whether he had a right so to do, it was fit the right should be determined before the wood was cut; for by this means, the wood might be preserved, if the Earl had no right to cut it, and expensive suits at law prevented, where very unequal damages might be given. Besides, by the constant practice of Courts of Equity, to grant injunctions to stay the cutting of wood, they necessarily bring the title into question. That costs were given to the respondents Lord *Altham* and Mr. *Bayley*, altho' they confessed giving the disturbance to the appellant, which he complained of in his bill, and insisted upon titles which neither of them proved, and consequently had altogether failed in their defence; altho' the Court had, in some measure, relieved the appellant against them, by giving him liberty to make use of those depositions, which proved *Knockangarrow* and *Camolin* park to be the same lands. That if the appellant was not entitled to relief against the other respondents, he seemed to be clearly entitled to relief against the Earl of *Anglesey*; for if the appellant had no right to the woods, the Earl could have no right to the 5000*l.* purchase money; and yet the bill was dismissed as against his Lordship with costs, and the appellant was left to recover that money as he could: Whereas, if what was surmised by the Court, and seemed to be the main foundation of the decree, was true, *viz.* that the agreement was only colourable, and set up merely to try the Earl's title; his Lordship ought, in that case, rather to pay the appellant his costs, than receive costs from him. It was therefore hoped, that this decree of dismissal would be reversed.

On the part of the respondent the Earl it was said, that P. Yorke.
having by his answer admitted the agreement with the appellant for the sale of the woods, and having proved his title
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thereto, he ought to have a full performance of that agreement, which he was ready and willing to perform on his part. — The other respondents printed no case against this appeal, nor did they either put in an answer to it, or appear at the hearing.

DECREE
reversed.
Jour. vol. 22.
p. 532.

AND therefore, after hearing counsel for the appellant and the respondent the Earl, it was ORDERED and ADJUDGED, that the decree complained of should be reversed; and that the said Court of Chancery should direct an issue to be tried at the King's Bench bar, by a jury of the county of *Dublin*, "Whether
" *James*, late Earl of *Anglesey*, elder brother of the respondent
" *Arthur* Earl of *Anglesey*, was seised in fee of the lands now
" called *Camolin* park, formerly *Knockangarrow*; and whether
" he devised the same:" In which cause *Arthur* Lord *Altham*,
Richard *Bayley*, and *Charles* *Annesley*, were to be plaintiffs;
and were to take upon them the proof that the said *James* Earl
of *Anglesey* was seised in fee of the said lands, and did devise
the same, and the appellant and *Arthur* Earl of *Anglesey* were
to be defendants; and the said Court of Chancery were to give all
necessary directions about the said trial: And the said *Arthur*
Earl of *Anglesey* and the appellant, and those who should derive
title under them, should be at liberty to make use of the
depositions taken in the said cause, on the behalf of the said
Arthur Earl of *Anglesey*, on the said trial; and if the said
Arthur Lord *Altham*, *Richard* *Bayley*, and *Charles* *Annesley*,
should refuse to deliver a declaration, or to proceed to trial,
by such time as should be appointed by the Court, the issue
should be taken against them *pro confesso*: And it was further
ORDERED, that after such trial had, or such issue taken *pro*
confesso, the Court of Chancery should proceed to make such
decree as should be just.

Roger Acherley, Esq; and Elizabeth his } Appellants.
Wife, - - - - - }

Case 15.

Bowater Vernon, Esq; William Vernon, }
Thomas Vernon sen. George Vernon, }
an Infant by his Guardian; Richard } Respondents.
Vernon, Francis Keck, Esq; John }
Nicoll, Esq; and Thomas Vernon, an }
Infant by his Guardian, - - - }

4th February, 1725.

THOMAS Vernon, Esq; being seised and possessed of a large real and personal estate, the greatest part whereof he had acquired in the profession of the law, wherein he had deservedly gained a great reputation; and having an intention to make a settlement of his estate, to preserve the same in his name and family, in case he should die without issue male; and entertaining a particular affection for the respondent *Bowater Vernon*, his cousin and next heir male, who had for several years lived in his family; he, on the 17th of *January*, 1711, made his will all of his own hand writing; and thereby devised to *Mary*, his wife, an annuity of 1000*l.* to be paid her half yearly during her life, by his trustees therein named, out of the rents and profits of his real estate, clear of all charges and deductions, except parliamentary taxes, and to be in lieu and satisfaction of her jointure, and of all other claims and demands out of his real estate. — He also gave to his said wife, during her widowhood, his capital mansion-house at *Hanbury*, with the gardens, orchards, out-houses and buildings thereunto belonging, and the park adjoining, and some lands usually kept in his own hands, she keeping the same in repair: But in default thereof, or in case she should marry again, or not think fit to reside there, for three months in every year; in each and every of those cases, his will was, that she should deliver the possession of the said premises to the respondent *Bowater Vernon*, if living, and if dead, to his son, if he should leave any, or to such other person of his name and kindred, as

1 Wms. 783.
Comyns Rep.
381. 513. 522.
9 Mod. 68.
10 Mod. 518.
Viner, vol. 4.
p. 64. ca. 5.
p. 115. ca. 41.
vol. 5. p. 84.
ca. 69.
vol. 6. p. 53.
ca. 9. p. 237.
ca. 10.
vol. 8. p. 156.
ca. 12. p. 205.
ca. 11. 12.
p. 244. ca. 20.
p. 413. ca. 13.
p. 477. ca. 2.
vol. 11. p. 153.
ca. 73.
2 Eq. ab. 209.
ca. 2. 565.
ca. 5.

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was to enjoy that, and the residue of his real estate, according to the trusts and limitations after mentioned. The testator likewise gave to his said wife, the use of all his goods, pictures and furniture, in his said capital messuage, during such time as she should enjoy the said messuage by virtue of his will, but so as not to remove any of them from the house; his will being, that his trustees, to whom he thereby gave all his said household goods, pictures and furniture, together with the books and other goods and furniture in his study and gallery, and in all out-buildings and offices there, should permit and suffer the same to be held and enjoyed with his said capital messuage, as heir-looms, by such person and persons, as from time to time should be entitled to the possession of the said capital messuage, according to his will. And he thereby empowered his trustees, to assign and transfer the said goods and furniture to other trustees, as there should be occasion, and as they should be advised might be necessary; and to have the trust so declared thereon, as might best tend to preserve and keep the said goods and furniture in the said house, and from being removed or severed from it, for the use and benefit of the persons who should or might become entitled to the said house by virtue of his will. — And he further gave to his wife 500*l.* to be paid within a month after his decease; and all the household goods and furniture of his dwelling house in *London*, his coaches and coach-horses, and all his plate, except what was therein after otherwise disposed of, together with all his broad gold, jewels, and watches, and also the clocks in the *London* house. The testator then gave to his sister, the appellant *Elizabeth Acherley*, an annuity of 200*l.* to be paid her half yearly out of the rents and profits of his real estates, to her own hands, for her separate use, exclusive of her present, or any after taken husband; and in case she happened to survive his wife, his will was, that the 200*l.* *per ann.* should from the time of his wife's decease, be made up 400*l.* *per ann.* during the life of his said sister, for her sole and separate use as aforesaid. — He gave to his niece *Letitia Acherley* 1000*l.* at her age of 18, or marriage, which should first happen; provided she should marry with the consent of her father and mother, and of his wife, or of such of them as should be then living; but if she married without such consent, he gave her but 100*l.* and the 900*l.* to cease, and fall into his personal estate, and be disposed of as therein after mentioned: And after some pecuniary legacies to others

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of his relations, the testator gave to his cousin *William Vernon*, all his messuages, lands and hereditaments, at *Horsington* in *Lincolnshire*, for 99 years, if he should so long live; with power to make a jointure, not exceeding one moiety thereof; and after his decease, the whole to his first and other sons in tail male successively; he or they who should have the possession of the said estate, paying thereout 100*l.* *per ann.* clear of all taxes and deductions, to his trustees during the life of his wife, the better to enable them to pay the annuities before devised, and to perform his will. — He then gave the said premises in *Lincolnshire*, to his trustees and executors during the life of the said *William Vernon*, to preserve the contingent remainders to his first and other sons in tail; but in trust, to permit him to receive the profits for his life, paying the said 100*l.* *per ann.* — And he gave to *Thomas Vernon*, youngest son of his cousin *William Vernon*, deceased, 20*l.* *per ann.* during his life; some money legacies to other relations; to each of his servants a year's wages, and some charities. — And then devised in the words following; *viz.*

“ All the rest and residue of my real and personal estate, my
 “ debts, legacies and funeral charges, being first paid and
 “ satisfied; I give and bequeath unto my brother *Roger Acher-*
 “ *ley*, Esq; *George Vernon*, rector of *Hanbury*, *George Wheeler*
 “ of the *Inner Temple*, Gent. *John Bearcroft* of *Meere Green*,
 “ Gent. and *Richard Vernon* of the *Webb-house*, Gent. their
 “ heirs, executors and administrators respectively, upon special
 “ trust and confidence in them reposed, that the annuities and
 “ annual rents before devised to my wife and sister, and other
 “ the persons herein for that purpose above named, being first
 “ duly paid out of the rents, issues and profits of my real
 “ estate, whereof I shall die seised or possessed, whether free-
 “ hold or leasehold, and after payment of all my debts, and
 “ all legacies that I have, or shall by this my will, or by any
 “ codicil or codicils, give or devise, my funeral charges, and
 “ the charges of the probate of this my will, and of admini-
 “ stration, being paid and satisfied; they my said trustees, and
 “ the survivor and survivors of them, or the heirs and assigns
 “ of such survivor, do lay out and invest the residue and sur-
 “ plus of my personal estate, in lands of inheritance in the
 “ county of *Worcester*, if conveniently may be, or if not, then
 “ in some near adjacent county, within the space of ten years

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“ after my decease. — And that they my said trustees shall
 “ stand seised and possessed of all my real and personal estate,
 “ during the life of my wife, to the uses and purposes in this
 “ my will mentioned, and to enable them the better to per-
 “ form the same; and that from and after the decease of my
 “ said wife, in case I shall happen to die without issue of my
 “ body, then living, they shall stand seised and possessed of
 “ all my manors, messuages, lands, tenements and heredita-
 “ ments, as well freehold as leasehold, for lives or years,
 “ and also of the lands hereby directed to be purchased with
 “ the surplus of my personal estate, and shall convey, settle
 “ and assure the same, in such manner as counsel shall advise,
 “ to the use of *Bowater Vernon* for 99 years, if he shall so
 “ long live; with power of making a jointure of any part of
 “ the premises, except the capital messuage and manor of
 “ *Hanbury*, so as such jointure do not exceed 500*l.* per ann.
 “ then to trustees during his life, to preserve contingent
 “ remainders, and to his first and other sons in tail male; and
 “ in default of such issue, to his brother *William Vernon*, for
 “ 99 years, if he shall so long live; with like power of
 “ making a jointure, and to trustees to preserve contingent
 “ remainders, and to his first and all other his sons in tail male;
 “ and in default of such issue, to his brother *Thomas Vernon*,
 “ and to his first and other sons in tail male, with power of
 “ making a jointure in manner aforesaid; and in default of
 “ such issue, to my kinsman *Thomas Vernon*, only son of
 “ *Edward Vernon* of *Guildford* in the county of *Surry*, Clerk,
 “ for 99 years, if he shall so long live; and then to trustees
 “ to preserve contingent remainders, and to his first and other
 “ sons in tail male, with a power of making a jointure as
 “ aforesaid; and in default of such issue, to *Vernon*,
 “ son of *George Vernon* of *Hanbury*, Clerk, for 99 years, if
 “ he shall so long live; with a power of making a jointure in
 “ manner before mentioned, and to trustees to preserve con-
 “ tingent remainders, and to his first and all other his sons in
 “ tail male: — And for default of such issue male, to all other
 “ the sons of the said *George Vernon*, begotten or to be begot-
 “ ten, for 99 years, if they respectively shall so long live;
 “ and to their first and other sons in tail male, severally
 “ and successively, according to their priority of birth and
 “ seniority of age, the elder and his issue male, to be
 “ preferred

preferred before the younger and his issue male. — And for want of such issue, to the heirs male of the body of *Richard Vernon*, my great grandfather, with a remainder to my own right heirs; or as near to the uses and limitations herein mentioned, as can be done by law, to the intent to preserve the estate in my name and family; but such settlement, conveyance and assurance so to be made, is to be subject and liable to such of the annuities, as shall not be then determined, given by this my will. — And I do hereby direct and appoint, that my said trustees, during the life of my wife, shall pay the clear surplus of the profits of my estate, real and personal, after payment of the annuities, debts, legacies and funerals, and all other necessary payments and outgoings deducted, unto the said *Bowater Vernon*, for so long of the time as he shall happen to live; and after his decease, to his first and other sons, or to such other person and persons successively, who, according to the devises and limitations above mentioned, shall or may become entitled to the possession of my real estate, or to have a conveyance thereof from my trustees, after the decease of my wife." And he gave 50*l.* a-piece to his trustees, who should act in the trust; and some other money legacies to other persons.

The testator lived about nine years after the making his will, during which time he purchased other lands and hereditaments, and a fee-farm rent of 35*l.* 17*s.* 6*d.* issuing out of his manor of *Hanbury*, which thereby became merged, and some other fee-farm and assart rents in the counties of *Worcester* and *Salop*, amounting to 71*l.* per ann.; and he also contracted for the purchase of lands in the county of *Warwick*, amounting to 62*l.* per ann, and paid great part of the purchase money; and being minded to dispose of all such lands, fee-farm rents and hereditaments, as he had purchased, or agreed to purchase, in the same manner as he had disposed of the bulk of his estate by his will; and having an intention to make an alteration of some of the trustees in his will, and to appoint new trustees in their stead; and being desirous to quiet his trustees, and the respondent *Bowater Vernon*, and the other devisees in remainder after him, against all disputes and controversies which might happen to be commenced against them by the appellants and *Letitia Acherley* their daughter; and in order to ratify and confirm

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confirm his said will, except as to the alterations in the codicil; the testator, on the 2d of *February*, 1720, in his last sickness, and about three days before his death, made a codicil to his will, all of his own hand writing; and which codicil was in the words following, viz. — “Whereas I made a will, dated on
“ or about the 17th day of *January*, 1711, whereunto *Peter*
“ *Cottingham*, *Philip Wright*, *John Cottingham*, and *Thomas*
“ *Alcock*, are witnesses; now I hereby ratify and confirm the
“ said will, except in the alterations herein after mentioned:
“ In the first place, the portion or legacy thereby given to my
“ niece *Letitia Acherley*, the daughter of my sister *Acherley*.
“ be made up in the whole the sum of 6000*l.* and payable to
“ her at her age of 21, or marriage, which shall first happen;
“ and I recommend it to her, to take her own mother’s and
“ my wife’s consent to her marriage, if they shall be then
“ living: But my mind and will is, that what I have given
“ to my sister and niece, be by them accepted and taken in
“ lieu and satisfaction of all they, or either of them, might
“ claim out of my real or personal estate; and upon condition,
“ that they release all right and title thereunto to the executors
“ and trustees in my will named. And having thus provided
“ for my sister and niece, I devise all the lands by me pur-
“ chased since the publishing of my will, either in *Worcester-*
“ *shire*, *Shropshire*, or *Warwickshire*, to the trustees and exe-
“ cutors in my will named; subject to the same trusts, and
“ for the same uses, to which I have mentioned to devise my
“ manor of *Hanbury*, and the bulk of my estate. — I hereby
“ revoke that part of my will, whereby I appointed *Roger*
“ *Acherley*, Esq; *George Vernon*, Clerk, and *Edward Vernon*,
“ Clerk, to be three of the trustees in my will; and I request
“ and desire my brothers *Francis Keck* and *John Nicoll*, Esqrs.
“ to be two of my trustees, and I devise my real estate to
“ them accordingly. — After all other debts and legacies, I
“ will that out of the surplus of my personal estate, the sum of
“ 1000*l.* be set apart for the poor of *Hanbury* and *Shrawley*,
“ to be kept as a perpetual stock for buying gowns for poor
“ old men and women, and coals and other fuel in the winter,
“ at the discretion of my executors and trustees.” The testator
then gave some money legacies, and an annuity of 5*l.* to *Mary*
Ankers for her life; and to *John Bonaker*, one of his servants,
the small copyhold tenement at *Hanbury*, wherein his father
lived, to hold for his life.

On

On the 5th of February, 1720, the testator died without issue; leaving *Mary Vernon* his widow, and the respondent *Elizabeth Acherley* his sister and heir at law: Whereupon Mr. *Nicoll*, Mr. *Wheeler*, Mr. *Bearcroft*, and Mr. *Richard Vernon*, proved the will and codicil in the Prerogative Court of Canterbury.

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appell.

Afterwards, *Letitia Acherley*, the testator's niece, exhibited her bill in Chancery for the portion or legacy of 6000*l.* given to her by the testator's codicil, and on the 19th of July, 1722, obtained a decree for the same, with interest from her age of 18; altho' the same was not payable until her age of 21, or marriage first happening; nevertheless, the respondent *Bowater Vernon* submitted thereto, to avoid disputes with so near a relation of the testator.

The appellants in September, 1721, exhibited their bill in Chancery, against the respondents and the said *George Wheeler* and *John Bearcroft*, two other of the trustees of the testator's will, who afterwards died, and also against *Mary Vernon* the testator's widow; insisting, that the testator by his will, had made no disposition of the reversion in fee of the lands in *Horsington*, devised to *William Vernon*, and his first and other sons in tail; and that therefore, the same descended to the appellant *Elizabeth Acherley*, as heir to the testator: — That the testator by his codicil, devised all the lands purchased by him since the publishing his will; but did not mention his fee-farm and assart rents, and that therefore the same also descended to the appellant: — That the testator made no surrender of his copyhold lands to the use of his will; and that therefore the same were not well devised: — That as the purchases of the lands contracted for were not completed at the testator's death, nor he in possession thereof, the same were not well devised by the codicil; but his equitable right and interest therein descended to the appellant: — That the new purchased lands being devised to the trustees and executors in the will named, and not to them and their heirs, they had only an estate for life therein; and the reversion and inheritance expectant on the trustees death, ought to descend to the appellant, as an interest undisposed of: — That the testator having by his codicil, revoked that part of his will, whereby he appointed *Roger Acherley*, *George Vernon*, and *Edward Vernon*,

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to be three of his trustees; he by that clause, revoked all the trusts and uses in his will, concerning his real and personal estate devised to the trustees; and left his real estate to descend to the heir, and his personal estate to be distributed according to the act of distribution: — That the testator having appointed Mr. *Keck* and Mr. *Nicoll*, to be two of his trustees, and devised his real estate to them accordingly; there wanted words to pass the inheritance thereof to them, — As to the release directed by the codicil to be made by the appellant *Elizabeth Acherley*, that the testator intended the same should extend only as to the sum of 1000*l.* which, by articles made upon the appellant's marriage, was to be laid out in lands, and settled to the use of the appellants and the issue between them; and which sum the testator had paid to the appellant *Roger Acherley*, and had not laid out the same according to the trusts in the said articles. — And, as to several manuscripts and reports of cases determined in the Court of Chancery, collected by the testator, that the same were as a monument, or *insignia* of the testator's great honour and learning, and ought to go to the appellant *Elizabeth Acherley*, as an inheritance descendible to his heir. — Upon these grounds the appellants, by their said bill, claimed all the testator's real estate, except what was given to Mrs. *Vernon*, and prayed that the rents and profits thereof might be accounted for to them; they also prayed an account of the testator's personal estate, and that the same might be distributed according to the act for distribution of intestate's estates.

The several defendants to this bill put in their answers; and the respondent *Bowater Vernon* by his answer insisted, that the testator intended by his will and codicil, to make a full and complete settlement of all his estates, real and personal; that he had thereby well and effectually devised the same; and that the appellants ought to make and execute a release of all right and title thereto, according to the condition in the testator's codicil, or relinquish what was given to them by the will.

The respondent *Bowater Vernon* soon afterwards exhibited his cross bill against the appellants and the trustees of the testator's will, and the said *Mary Vernon* his widow; to have an execution and performance of the trusts in the said will and codicil.

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On the 20th of November, 1723, both causes were heard before the Lord Chancellor *Macclesfield*; when his Lordship was pleased to declare, that the testator's will and codicil were well proved, and that the said will not only stood unrevoked by the codicil, but was thereby confirmed; that the testator's signing and publishing his codicil in the presence of three witnesses, was a republication of his will, and both considered together, made but one will; and that by the said testator's will and codicil, his fee-farm rents, assart rents, and the lands contracted to be purchased by him, and all the testator's real and personal estates, and all the interest he had therein, except his copyhold lands purchased before his will, if any such, did well pass; and did therefore order, that the appellants bill should stand dismissed; and his Lordship declared, that such dismissal ought to be with costs: But the respondent *Bowater Vernon*, then present in Court, waiving the same, if the appellants would give a release of their claims and demands out of the testator's estate, except the copyhold lands purchased before the will, if any, and what was given to them, or either of them, by the will; it was further ordered, that if the appellants should, by fine, and such other means as Mr. *Edwards*, one of the Masters of the Court, should approve, make and execute an effectual release of all their claims and demands, to or out of the said testator's estates real and personal, except the copyhold lands purchased before the testator's will, if any such, and what was to them or either of them given by the will; or should, by an instrument to be settled by the said Master, relinquish what was given to them or either of them by the will, by such time as the Master should appoint; that then the appellants should be excused payment of costs to any of the defendants, except Mrs. *Vernon*: But if the appellants should not think fit to execute such release, or to relinquish the legacies given to them or either of them by the will, within such time as should be appointed by the Master, then they should pay all the defendants their costs, to be taxed.

And in the cross cause it was ordered and decreed, that the trustees should account for the testator's personal estate; and the respondents *Keck* and *Nicoll* refusing to act in the trust, it was further ordered, that they should release their trust to Mr. *Wheeler* and *Richard Vernon*, the other surviving trustees; and that the Master should appoint new trustees, in the place of the trustees

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trustees that were dead, or refused to act; and the surviving acting trustees were to convey and assign the testator's real and personal estate, as the Master should direct, to the use of themselves and the new trustees, upon the trusts directed and appointed by the said testator's will and codicil: And that the trustees should proceed to compleat the purchases of the lands and hereditaments contracted to be purchased by the testator in his life-time; and that the residue of the testator's personal estate, should be invested in the purchase of lands of inheritance in the county of *Worcester*, or in some near adjacent county, to be approved by the Master, who was to see the lands, when purchased, and also the lands contracted to be purchased by the testator, settled and conveyed according to the directions of the said will and codicil: And it was further ordered and decreed, that the defendant *Mrs. Vernon* should hold and enjoy the house at *Hanbury*, and the lands held therewith, according to the testator's will; and that the trustees should pay her the annuity of 1000*l.* half yearly, free from deductions, except parliamentary taxes, and proper directions were thereby given for the safe keeping of the title deeds relating to the testator's real estate, at his house at *Hanbury*, and also touching the charities given by his will and codicil. And as to the manuscript cases and reports collected by the testator, all parties submitting and desiring that the same might be inspected, printed and published, as the Court should think best, for the reputation and honour of the testator, and for the benefit of the profession of the law; his Lordship reserved the further consideration thereof: And it was further ordered, that all parties should have their costs in that cause, to be taxed and paid out of the testator's personal estate, except the appellants; and if they should think fit to execute such effectual release, or relinquish what was to them or either of them given by the will, as before directed; then they were likewise to have their costs of that suit, to be taxed and paid out of the said personal estate.

C. Wearg.

L. Stucley.

The appellants apprehending this decree to be erroneous, and contrary to the fixed and established principles of law and equity, appealed from it; and in support of the appeal it was argued, that the testator by his codicil, had ratified and confirmed his will, *except in the alterations in his codicil mentioned*; the most material of which alterations, so excepted, was the devise of that real estate to *Mr. Keck* and *Mr. Nicoll* only, which he had before

before by his will devised to other trustees named in the will; and therefore this excepted devise, was an absolute revocation of that part of his former will. That this real estate being only devised by the codicil to Mr. Keck and Mr. Nicoll, and they being thereby expressly declared to be trustees for the testator, by the words ["my trustees"] and no other declaration of trust being made of this devise, for any other person; the trust thereof, on the death of the testator, must, by the principles and rules of law, descend to his heir, the appellant *Elizabeth*, whom the law had appointed to succeed: Or, if it were doubtful for whom they were trustees, yet, even in that case, by the fixed and established rules of law, the trust must result to the heir of the testator; for the right of the heir to succeed, being a certain right, can never be defeated, unless by the right of some other person equally certain; but which, in the present case, could not be pretended. That the statute of frauds and perjuries requires, that all declarations or creations of trusts of lands (except trusts arising and resulting by implication of law) shall be manifested and proved by some writing signed by the party, or by his last will in writing; or else, they shall be utterly void and of none effect: But as the testator had not expressly declared, or limited over the trust of the devise to Mr. Keck and Mr. Nicoll, to any other person than himself; that trust therefore, as well by the rule of law, as the rule instituted by this statute, could not possibly arise to the respondent, but was by law cast upon the appellant *Elizabeth*, as heir. That there were no words in the codicil, which devised or passed the fee-farm rents, or assart rents, purchased after the will; the devising clause being of the lands only. That the codicil was made by a separate writing, and the writing containing the old will, not having been re-executed and attested by three witnesses, the codicil altho' it had three witnesses, could not be a republication of the will, so as to pass the fee-farm rents by the will. That the testator had no power to devise the lands which were only contracted for, because neither he, or his trustee had any estate therein, in possession, reversion, or remainder; but only a contract, that they should be conveyed at a time, which did not happen in the life-time of the testator: And even if it had been in his power, yet there were not any words in the codicil, sufficient to pass these lands. Lastly, that the appellants were decreed to pay costs, unless they consented to

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part with what right they claimed to the premises in question; which ought not to have been done. And therefore it was hoped, that the decree, so far as concerned the fee-farm rents and assart rents, purchased after the will; the lands contracted to be purchased, and not conveyed; the trusts of the excepted devise to Mr. Keck and Mr. Nicoll, whereof no trusts were declared, or limited over; and also as to the costs, would be reversed: And that those particular estates, together with the benefit of the contract, would be decreed to the appellants, and that they should have their costs in the original cause; and the rather, for that afterwards, there would be left of the testator's estate to the respondents, who were but remote relations, to the value of 100,000*l.* or upwards.

T. Lutwyche.

C. Talbot.

To this it was answered on the other side, that it was manifest the testator intended by his will and codicil, to make a settlement of his whole estate, real and personal (except what was otherwise expressly devised) upon the respondent *Bowater Vernon* and his issue male, and the other persons in remainder after them, in order to preserve the same in his name and family; for by his codicil, he declared his mind and will to be, that what he had given to his sister the appellant *Elizabeth*, and to his niece her daughter, should be by them accepted and taken, in lieu and satisfaction of all that they, or either of them, might claim out of his real or personal estate; and upon condition, that they released all right and title thereto, unto the executors and trustees in his will named; and it was insisted, that there were words in the codicil sufficient to answer this general intention of the testator, and to pass the fee-farm rents and assart rents, as well as the rest of his real estate, purchased after making the will. But if there were any doubt touching the extent of the words in the codicil, yet the testator having thereby taken notice of his will, and ratified and confirmed the same, and having executed the codicil in the presence of three witnesses; it ought to be taken as a republication of the will, and both ought to be considered together as one will. That as to the lands contracted to be purchased by the testator in his lifetime, and for which he had paid great part of the purchase money; it was contended, that whether they were to be considered as real or personal estate, they were well devised by the codicil. That the testator did not by his codicil revoke, or intend to revoke any of the devises or limitations in his will of

his

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his real estate, or of the *residuum* of his personal estate, but barely to change some of his trustees, for which he had particular reasons, and to substitute new ones in their stead; and it was manifest, that the testator intended Mr. Keck and Mr. Nicoll to be two of the trustees for the respondent *Bowater*, and those in remainder after him; the trusts in the will being the only trusts that could be intended, and made use of a very significant, and comprehensive mode of expression for that purpose, by the devise of his said real estate to them, accordingly. And as to the appellants costs, it was hoped, that if they did not think fit to accept the offer made by the respondent *Bowater* *Vernon* at the hearing, they should not only pay costs in the original cause, but should also lose their costs in the cross cause; for that their original bill was vexatious, having thereby and by their answer to the cross bill, disputed almost every branch and article of the testator's will and codicil, and put the respondent *Bowater* to a considerable expence in defending the same.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

DECREE
affirmed.
Jour. vol. 22.
p. 588.

Edward Edgworth, Esq;

Appellant.

Case 16.

Maddi Swift, Gent.

Respondent.

11th February, 1725.

SIR *Edward Tyrrell, Bart.* being seised in fee of *Longwood* and several other lands in the kingdom of *Ireland*, of great yearly value; and possessed of the lands of *Lynn* and *Rathdiffe*, in the county of *Westmeath*, for the term of 1000 years, at a pepper-corn rent, by virtue of a lease from *Nicholas Darcy, Esq;* died in the year 1690, leaving issue *Catherine*, his only daughter and heir, the appellant's mother.

The said *Sir Edward Tyrrell* was, after his death, outlawed for high treason, on account of the rebellion in *Ireland*; by means whereof, the said several lands were seised into the hands of their Majesties King *William* and Queen *Mary*.

But,

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But, there being a prospect of reversing that outlawry as being erroneous, *Robert Edgworth*, Esq; the appellant's father, proposed to marry the said *Catherine*; and having obtained the consent of Dame *Ellinor Tyrrell*, her mother, it was, by articles previous to the marriage, dated the 5th of *July*, 1692, and made between the said *Robert* of the one part, and the said Dame *Ellinor Tyrrell*, on behalf of herself and her said daughter *Catherine*, of the other part, agreed, that whenever the said *Catherine*, or the said *Robert* in her right, should be restored to the estate of the said Sir *Edward Tyrrell*, or any part thereof, the same should immediately after be settled on the said *Robert* and *Catherine* for their lives, and the life of the longer liver of them; remainder in tail male to the first son of the said *Robert* by the said *Catherine*, with other remainders over.

The marriage soon afterwards took effect; and Sir *Edward's* estate being vested in the trustees of *Irish* forfeitures, by the act of resumption, it was, by a private act of Parliament made in the first year of Queen *Ann*, enacted, that the said trustees should convey all the estate forfeited by the said Sir *Edward Tyrrell*, to the said *Robert* and *Catherine* and their heirs, discharged of all forfeitures; and the said trustees, by deeds of lease and release, dated the 8th and 9th of *October*, 1702, conveyed the same accordingly; and also, by their deed dated the 10th of the same month, granted the said lands of *Lynn* and *Rathduffe* to the said *Robert* and *Catherine* for 974 years, being the residue then to come of the said term of 1000 years.

Robert Edgworth being extravagant, and Dame *Ellinor* fearing the consequences thereof, used her best endeavours to provide a separate maintenance for the said *Catherine* and her issue, during the life of *Robert*; and for that purpose, she proposed to release a right which she had to a third part of the said estate for life, which at that time amounted to 500*l.* per ann. and upwards, to the said *Robert Edgworth* for 200*l.* on condition, that he would convey and assign over the said term for the separate maintenance of the said *Catherine* during her life, and after her death, for the use and benefit of her eldest son by him; to which proposal *Robert* having agreed, Dame *Ellinor* accordingly executed such release; and as a farther inducement to *Robert*, did remit to him 100*l.* part of the said 200*l.* and thereupon *Robert*, in pursuance of the said agreement, prevailed upon *John Percival*,

Percival, Esq; who was entitled by several mesne assignments, to a mortgage of the said term under Sir *Edward Tyrrell*, to assign over the same to *Robert Adair*, Gent. who was pitched upon to be a trustee in the said settlement, and in which deed of assignment the said articles were recited; and in further execution of the said agreement, *Robert* and *Catherine*, on the 17th of June, 1703, conveyed the residue of the said term to the said *Robert Adair*, upon the following trusts, viz. that *Catherine* might receive and dispose of the yearly rents and profits of the lands for her natural life, to her separate use, as if sole; and afterwards in trust for, and to the only use and behoof of the appellant, by the designation of the first and eldest son of the said *Robert* by the said *Catherine*; and the said *Robert Edgworth*, by the same deed, reserved to himself a yearly rent of 20*l.* during his life, out of the said leasehold premises, with liberty to distrain for the same.

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The reversion and inheritance of the lands of *Lynn* and *Rathduffe* being forfeited by the attainder of *Nicholas Darcy* the lessor, and being vested in the said trustees; they, for some small consideration, conveyed the same to the said *Robert Edgworth*.

In pursuance of the said marriage articles, *Robert Edgworth* and his wife conveyed to *Francis Edgworth*, Esq; and his heirs, the reversion of the said last mentioned premises, and all other the estate formerly belonging to Sir *Edward Tyrrell*, to the use of the said *Robert* and *Catherine*, for their lives, without impeachment of waste; with remainder to the use of the appellant their eldest son, during his natural life; remainder to the trustee and his heirs, for preserving the contingent uses; remainder to the appellant's first and other sons successively in tail male; with several remainders over: And with power for the said *Robert* and *Catherine* to charge portions for younger children, not exceeding 1000*l.*; and a power for the appellant, after the death of *Robert* and *Catherine*, to settle a jointure on any wife he should marry, not exceeding 300*l. per ann.*

Catherine died in the year 1707, leaving the appellant her eldest son, then a minor about nine years old; whereupon the said *Robert Edgworth*, in some few months afterwards, married a second wife; and notwithstanding the said articles and settle-

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ment, took upon him to make fee farms and long leases of the premises, or part thereof, at small rents; and to mortgage and sell other part thereof; and publicly notified, that he intended to sell the residue.

But the appellant having come to the knowledge of his title to the premises under the said articles, settlement and deed of trust, did, for preventing any further sale, give public notice of such his title; at which *Robert* his father being displeased, and some other disputes having arisen between them, *Robert*, in *December*, 1717, exhibited his bill in the Court of Exchequer in *Ireland* against the appellant; alledging, that neither he, or the said *Catherine*, ever made or executed any articles upon or before their intermarriage, or any settlement of the said premises; and therefore prayed, that if the appellant did insist on any articles or settlement, he might be obliged to shew cause, why the same should not be brought into Court and lacerated.

Vide vol. II.
P. 326. et seq.

To this bill the appellant put in his answer, tho' at that time a minor, and insisted on the said articles and settlement; and the cause being at issue, many witnesses were examined, who proved the articles and settlement; but some orders having been made in the cause, which the appellant apprehended would, in their consequences, run him into many suits; he, on the 27th of *March*, 1721, appealed to Parliament from those orders; and upon hearing that appeal, they were reversed; and it was ordered, that the said *Robert Edgworth* should make all the purchasers, lessees and mortgagees parties to the said bill, or to join with him therein; to the end, that one decree might conclude all parties, and that the appellant should not be harassed with a multiplicity of suits about one and the same matter.

Notwithstanding this order, *Robert Edgworth* made no farther progress in the cause, than to serve some few of the tenants with subpoenas to answer; but in order to deprive the appellant of the benefit of the said order, he procured the present respondent to exhibit a bill in the Court of Chancery in *Ireland* against himself, the said *Robert Adair*, the appellant and others, pretending that the said lands of *Lynn* were granted to him in fee farm by the said *Robert Edgworth*, some time in the year 1711; and praying that the same might be established, and the said articles and settlement set aside; and that *Adair* might be obliged

obliged to convey over the said trust term to the respondent, in order to protect his title to the premises under the said fee farm; or that the said *Robert Edgworth* might be compelled to make him recompence for the value thereof, and the loss he was likely to be at by the appellant's pretensions, out of his real and personal estate.

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To this last bill the appellant, tho' at that time also a minor, put in his answer, and thereby insisted on the said articles and settlement, and also on the deed of trust; and that he was a purchaser under the same for valuable considerations, prior to any right pretended to by the respondent.

The appellant soon afterwards, caused an ejectment to be brought in the Court of King's Bench in *Ireland* in *Adair's* name, for recovering the actual possession of the said lands; to which the said *Robert Edgworth* and the respondent appeared and made defence; and the appellant being prepared to go to trial, the respondent, by contrivance with *Adair*, prevailed on him to release the action; tho' the appellant had tendered him undeniable security, to indemnify him from any loss that might attend the same. And at the same time the respondent, in pursuance of such contrivance, exhibited a supplemental bill against the appellant and *Adair*, and served *Adair* with process long before the appellant was served, or had notice that any such bill was filed; by which management, the respondent obtained an injunction for want of *Adair's* answer in time; but the appellant being soon after apprised thereof, put in his answer forthwith, and after some time, prevailed on *Adair* to put in his answer.

The appellant thereupon applied to the Court in the usual manner, to dissolve the injunction; or, in case it should be thought proper to continue the same, that the respondent might be obliged to waive the benefit of the release from *Adair*, and give judgment at law upon the ejectment, with a release of errors; both which the Lord Chancellor was pleased to refuse, and continued the injunction till the hearing.

The cause being at issue, witnesses were examined on both sides; but the respondent having obtained an order to pass publication, before the appellant had wholly finished examining his witnesses, and the cause being set down to be heard; the

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appellant was under a necessity of applying to the Court for liberty to prove some exhibits, *viva voce*, which he had before proved in other causes; and tho' this was merely a motion of course, yet the Lord Chancellor thought proper to refuse it; and the cause coming to be heard on a conditional decree, upon the 23d and 25th of *November*, 1723, his Lordship was pleased to admit the answer of the said *Robert Edgworth*, to be read as evidence against the appellant; and on the 27th of *January* following, he directed an issue, to try whether the said articles dated the 5th of *July*, 1692, were perfected by the said *Robert Edgworth*; and his Lordship at the same time declared, that in case the said articles were found to be perfected, he would consider the equity of the respondent's case.

The appellant intending to appeal from these several proceedings, applied to the Deputy Register of the Court of Chancery, for attested copies of the minutes taken on the motion for liberty to prove exhibits *viva voce* at the hearing; which being denied, he on the 24th of *February*, 1723, applied to the Court to oblige the Register to attest those minutes; but the Lord Chancellor was pleased to refuse the same.

The appellant therefore prepared an appeal; but before it could be presented, an order was made that no more appeals should be received that session: The respondent taking advantage of this accident, and knowing that the appellant was detained in *England* on account of some other appeals then depending; applied to the Court on the 6th of *May*, 1724, to have the issue taken as found against the appellant, which was ordered accordingly; and on *Friday* the 12th of *June* following, his Lordship was pleased to decree, that the articles and settlement which the appellant was refused liberty to prove on the hearing, and to which the issue had no relation, should be set aside, and the fee-farm deed established; and further ordered, that the defendant *Adair*, should convey over to the respondent the residue of the said term, and likewise the said mortgage; and that a perpetual injunction should be awarded against the appellant, to stop all further proceedings under the said articles and settlement.

J. Roche.

E. Hoskins.

In support of the appeal it was said, that the appellant having sworn in his answer, that he was a purchaser for a valuable consideration,

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consideration, prior to any right pretended to by the respondent, and not having confessed any manner of equity therein; the injunction ought not to have been continued, nor the appellant prevented from asserting and verifying his title at law: But if there had been any colour for continuing the injunction, the Court ought to have obliged the respondent to give the appellant, or his trustee, judgment at law, with a release of errors. That the refusing the appellant liberty, to prove exhibits *viva voce*, at the hearing of the cause, was unprecedented. That the term appearing to have been assigned to *Adair* for a valuable consideration, upon express trust for the appellant, after the death of *Catherine*, a Court of Equity ought not to have interposed; especially as, if the allegations of the respondent's bill were true, he might by his own shewing, have made a good defence and had a proper remedy at law; and therefore, and for that the whole of this suit seemed calculated to elude the order made on hearing the former appeal, the bill ought to have been dismissed. That the appellant's present title to the lands of *Lynn* and *Rathduffe*, was under the deed of trust to *Adair*, and not under the articles, and therefore no issue ought to have been directed as to those lands; and the rather, for that there was not any room left to conceive or entertain the least doubt of the reality thereof, the Court having declared the same were sufficiently proved; and as the persons who appeared to be entitled to estates in remainder, by virtue of the articles and settlement, were not made parties to the suit, no trial could be effectual, available, or conclusive, as to them. That the answer of *Robert Edgworth* was admitted to be read as evidence against the appellant, which ought not to have been done: And that *Adair* was not only decreed to assign over the term to which he was entitled in trust for the appellant, under the deed of the 17th of *June*, 1703, but also the mortgage for protecting the respondent's title; and which ought not to have been decreed to be so assigned, without first permitting the same to be proved and read, or knowing what it was.

On the other side it was insisted, that the respondent was a purchaser of the said fee-farm lease of *Lynn*, for a valuable consideration, without any notice of the said articles and settlement, even if the same were real and genuine: But *Robert Edgworth* had, upon oath, absolutely denied that he had ever executed the said articles or settlement. That the pretended

P. Yorke.
C. Talbot.

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assignment of the term to *Adair*, in trust for the appellant, and under which he now claimed a title to the lands of *Lynn*, appeared to be engrossed on *parchment*; whereas by the evidence of witnesses of undeniable character, it appeared, that the assignment of the said term executed by the said *Robert Edgworth*, the appellant's father, was engrossed on *paper*: And the appellant having brought an ejectment against one *Smith* and *Damer*, to recover the lands of *Rathduffe*, under the same title; the jury upon the trial, found a verdict for the defendants. That the appellant examined witnesses, to prove the execution of the pretended settlement of *December, 1703*; but having failed therein, and there being just ground to suspect the reality of it, it was apprehended, the Court did right in refusing him liberty to prove the same *viva voce* at the hearing. That the appellant had received great indulgence in the proceedings in this cause; for publication was respited, that he might have time to examine the witnesses which he desired, and several times were appointed for the appellant to appear, in order to try the issue directed, before the same was ordered to be taken *pro confesso*; but he having avoided such trial, it was but just to take the said issue *pro confesso*; and the decree founded thereon, being perfectly agreeable to the rules of equity, ought to be affirmed.

DECREE
reversed.
Jour. vol. 22.
P. 592.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order of the 27th of *January, 1723*, and all the proceedings subsequent thereto, should be reversed; and that the Lord Chancellor of *Ireland* should direct an issue at law, to try the validity of the execution of the articles, of the 5th of *July, 1692*, of the settlement of the 17th of *June, 1703*, and of the settlement of the 25th of *December, 1703*; which issue should be tried at the bar of the Court of Common Pleas, by a jury of the county of *Westmeath*; and that the said Lord Chancellor should give proper directions for the settling and trying the same: And it was further ORDERED, that the appellant should, with all convenient speed, deliver the said articles and settlements into the said Court of Chancery, to remain there till the trial should be had; but in the mean time, to be inspected by each party as there should be occasion; and that the said articles and settlements should be produced at such trial, and, after the same had, be returned back to the said Court

of

of Chancery, to be disposed of as the said Court should direct; and each party should, after such trial, resort back to the said Court of Chancery, to have such further directions as should be just.

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Henry Browne, Jude Clarkson, Humphrey Drew, Andrew Davis, John Wardell, and Thomas Lloyd,

Appellants.

Case 17.

Richard Gibbins,

Respondent.

21st February, 1725.

THE respondent, getting his living in *Exchange Alley* by selling lottery tickets and *India* bonds, became acquainted with the appellants in the month of *August*, 1720, who agreed to become partners with him in the purchase of fifteen shares of *Welsh* copper; and, in pursuance of such agreement, the respondent on the 19th of that month, bought of one *Miller* a broker, who was agent for *Francis Sawle*, those fifteen shares at 50*l.* per share, amounting to 750*l.*; and *Miller* and the respondent were each to deposit 100*l.* a-piece, to secure the performance of this contract; and the shares were to be transferred at the next opening of the books: Whereupon the appellants and the respondent jointly, advanced equal proportions of the 100*l.* being each a seventh part thereof, amounting to 14*l.* 5*s.* 8*d.* 4. which was accordingly paid into the hands of Messrs *Green* and *Eades*, goldsmiths, as a deposit to secure the performance of the agreement on the part of the appellants and the respondent; *Miller* at the same time, also depositing the like sum of 100*l.*

Soon afterwards, a proclamation issued to prevent persons making, or accepting of any assignment, or transfer of any stocks, of any company, without legal authority by act of Parliament or charter, to warrant such body corporate to transfer shares therein; and a *scire facias* issuing against the *Welsh* copper company, the respondent, for fear of incurring the penalty mentioned in the proclamation, if he accepted the said stock

at

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at the opening of the books, did not accept the same: Whereupon, *Sawle* commenced his action in the Court of King's Bench against the respondent, upon which he was arrested and held to bail in 800*l.* and kept in custody for want of bail, three days; and after he had put in bail, he acquainted *Browne* and *Clarkson*, two of the appellants, with the same, who agreed that the action should be defended, and went with the respondent to an attorney for that purpose; and the respondent several times gave notice to the appellants to meet together, in order to agree about terms of accommodation with *Sawle*, but they could never be prevailed upon by the respondent to meet; so that he had it not in his power to make any composition, in case *Sawle* would have accepted any.

The respondent having pleaded to the action, exhibited his bill in the Court of Chancery in *Michaelmas* term, 1721, against the appellants and *Sawle*, and also against *Miller* the broker; praying a stay of the proceedings at law, and that whatever damages and expences the respondent should be put to, might be borne and paid by the appellants, as his partners and sharers in the contract.

In *Easter* term, 1722, the action at law was tried before the Lord Chief Justice *Pratt*, the appellants having had previous notice in writing given them thereof; upon which trial, the respondent made the best defence he could, but the plaintiff proving the contract, and the registering thereof, and that he had more stock than was sold to the respondent, in the company's books; the jury brought in their verdict for 650*l.* And *Sawle* threatening to take the respondent in execution, whereby he would have been utterly ruined; he was forced to pay down 150*l.* and give *Sawle* security for the remainder.

On the 28th of *February*, 1722, the cause was heard before the Master of the Rolls; who decreed it should be referred to a Master, to certify how much the respondent had paid *Sawle*, and what security he had given him for the remainder; and the respondent and *Sawle* were to make an affidavit what money had been paid *Sawle*, and what money was agreed to be paid on that security; and the Master was to tax *Sawle* his costs; and upon the respondent's paying what should appear due to *Sawle*, for principal money and costs, he was to acknowledge satisfaction

on the judgment obtained against the respondent, and deliver up the security: And it was further ordered, that the appellants should pay the respondent, their respective proportions of the money, which the Master should certify had been paid by the respondent to *Sawle*, or that the respondent was liable to pay him on the said security; and also their proportions of the costs of the suit, which the respondent was to pay *Sawle*, and of acknowledging satisfaction on the judgment.

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From this decree, the appellants appealed to the Lord Chancellor *Macclesfield*; and the cause being reheard on the 9th of May, 1724. his Lordship declared, he saw no cause to alter the decree; and therefore ordered the respondent to have the deposit.

The Master made his report, on the 16th of November, 1724; and thereby certified, that by an agreement in writing made between the respondent and *Sawle*, dated the 22d of May, 1722, and a receipt under *Sawle's* own hand, dated the same day; the respondent had paid *Sawle* 150*l.* in part of 650*l.* damages, and 18*l.* costs at law, and was to give *Sawle* security for payment of 500*l.* with interest, in 18 months; which security was accordingly given, by a mortgage of the respondent's houses in *Kentish Town*; and that the respondent and *Sawle* had made such affidavits, as the decree directed: And the Master further certified, that the respondent was liable to pay *Sawle* interest for the said 500*l.* from the 11th of May, 1722, which he had computed at 5*l.* per cent. to the 11th of December then next, and amounted to 64*l.* 11*s.* 8*d.*; and that he had taxed *Sawle's* costs at 22*l.* 8*s.* which, added to the aforesaid sum of 650*l.* damages, and 18*l.* costs at law, amounted in the whole to 754*l.* 19*s.* 8*d.* which was the total sum the respondent was to pay *Sawle*; and of which he had paid 150*l.* as aforesaid. The Master also certified, that he had considered of the appellants and the respondent's proportions of the said sum of 754*l.* 19*s.* 8*d.* and found each person's proportion to be 107*l.* 17*s.* 1*d.* 4*q.* which by the decree, the appellants were directed to pay to the respondent; and he appointed the respondent to pay *Sawle* 604*l.* 19*s.* 8*d.* being what remained unpaid of the said sum of 754*l.* 19*s.* 8*d.* upon the 11th of December then following.

The appellants took an exception to this report, because the Master had allowed interest for the said 500*l.*; and the cause

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being heard upon this exception on the 8th of March, 1724, before the Lords Commissioners for the custody of the Great Seal, the exception was over-ruled, and the report confirmed.

P. Yorke.
W. Hamilton.

From both these decrees, and the order over-ruling the exception to the Master's report, the present appeal was brought; and on behalf of the appellants it was insisted, that they were no parties to the contract between the respondent and *Miller*, as the agent of *Sawle*, nor knew any thing of it till afterwards, and even then were strangers both to the respondent and *Sawle*. That the only agreement which the appellants entered into was, to advance their respective shares of the deposit, after the respondent had made the agreement in his own name only, and without taking any notice of them; and they were to run no other risque in that agreement, than the forfeiture of their proportions of the deposit, in case the stock should not be worth acceptance; but were not to be obliged, in all events, to take the stock: Besides, the appellants had no receipt for the money which they advanced; nor any note or agreement under the respondent's hand, to oblige him to give them their proportional shares of the advantage of the bargain, in case any should arise. That the action between *Sawle* and the respondent, was apprehended to be collusive; in regard *Sawle* offered to acquit the respondent from the contract for twenty guineas, but which he refused to give: *Sawle* likewise offered to acquit the respondent, upon his allowing him to take the deposit, but which he also refused, and never communicated either of these proposals to the appellants. That the suit in Chancery, as between the respondent and *Sawle*, was amicable; the respondent having neither replied to *Sawle's* answer, or moved for an injunction, or examined any witnesses; altho' by his bill, he not only prayed an injunction, but also to have the contract delivered up. That there was no proof in the cause, that the contract was registered in time, or that *Sawle* was possessed of stock, according to the act of 7 Geo. I. for restoring public credit; neither was it in proof, that *Sawle* ever transferred, or tendered the stock in question to the respondent; but which ought to have been proved, to the satisfaction of the Court. That the appellants not being parties to the action at law, and therefore not able to make a defence thereto, ought at least to have the benefit of a trial at law; not only as to the validity of the contract, in the several respects aforesaid, but also as to the point, whether

the

the appellants forfeiting their shares of the deposit, would not, or did not avoid the contract, as between them and the respondent.



On the other side it was contended, that the contract for the purchase of the stock, tho' made in the respondent's name only, was so made on account of all the partners; that the appellants, in pursuance thereof, paid each their proportion with the respondent of the deposit, and would have been entitled to an equal share of all profit, if any could have been made thereon; and therefore ought, in equity and justice, to bear their proportion of all loss by the contract, and not leave the same wholly upon the respondent, who, as to the shares of the appellants therein, acted only as their trustee. That the appellants having suffered the respondent alone to be prosecuted at law upon this contract, and having previous notice of the trial given to each of them respectively, ought to have assisted the respondent in making a defence; but as they neglected to do so, they ought to be equally bound with him, by the event of the trial. That *Sawle* having, upon the trial, made all the proofs required by law, and having thereupon recovered a verdict for 650*l*. it was but just and reasonable, that the appellants should pay their proportions thereof, the respondent having done all that lay in his power to prevent the same; and especially, as it was not in his power to make any composition with *Sawle*, without the joint consent of all the appellants, who never could be prevailed upon to meet together for that purpose. It was therefore hoped, that the said decrees, report, and proceedings, would be affirmed; and the appeal dismissed with exemplary costs.

T. Lutwyche.
C. Talbot.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and that the decree, affirmance and order therein complained of, should be affirmed.

DECREE affirmed.
Jour. vol. 22.
p. 601.

Sir

Case 18. Sir *John Rusbout*, Bart. - - Appellant.
Elizabeth Rusbout, - - Respondent.

28th February, 1725.

Viner, vol. 16.
 p. 333. ca. 11.
 449. ca. 11.
 2 Eq. ab. 655.
 ca. 8.

SIR *James Rusbout*, father of the appellant, and grandfather of the respondent, in consideration of a marriage between him and *Alice Palmer*, and of her marriage portion, by lease and release, dated the 13th and 14th of September, 1669, conveyed to Sir *George Benyon* and other trustees, and their heirs (among other lands) the manors of *Maylards* in *Essex*, and of *Upperswell*, alias *Overfwell* in *Gloucestershire*, and of *Stone* in *Worcestershire*; to the use of himself for his life, remainder to trustees to preserve contingent remainders; remainder to the use of the said *Alice* for her life, for her jointure; remainder to the use of the first and other sons of the marriage, in tail male successively; remainder to the use of the right heirs of Sir *James*. With a power reserved to Sir *James*, to revoke all the uses of this settlement, except the estate for life of the said *Alice* his wife.

The marriage took effect, and Sir *James* had issue by Dame *Alice* his wife three sons, namely, *James*, the respondent's father, the appellant Sir *John*, and *George*, who died without issue; and three daughters, *Elizabeth*, afterwards married to Sir *George Thorold*, *Alice*, married to *Edwyn Sandys*, Esq; and *Catherine*, married to *Samuel Pitt*, Esq.

On the 23d of October, 1695, Sir *James Rusbout* made his will; wherein taking notice of the settlement and of his wife's jointure, and that she had released the same, and in lieu thereof had accepted of an annuity of 600*l.* per ann. for her life; he by his will, confirmed the said settlement upon his sons, subject to the said annuity; and appointed, that the manors and premises comprised in his settlement, together with the manor and rectory of *Harrow* in *Middlesex*, subject to the said annuity, should be a provision for his eldest son, till his age of 24; and he devised to his executors, and the survivor of them and his heirs, his manors of *Northwick*, *North* and *Middle Littleton* in *Worcestershire*,

cestershire, and *Egerton* and *Swingfield* in *Kent*, and all other his lands in those two counties, not before settled; in trust, that they should receive the rents thereof, until some son of his should attain the age of 24, and apply the same and the proceed thereof, for the payment of the testator's debts and legacies; and the surplus to be laid out for the benefit of his eldest son and heir. He then devised his lands in *North* and *Middle Littleton*, subject to the trusts aforesaid to his executors, and the survivor of them and his heirs, in trust, that they should, out of the rents and profits thereof, raise 200*l.* per ann. for his younger sons *John* and *George*, equally for their lives, from their respective ages of 21; but if it should be thought for their advantage, to turn the said annuities into money, then his eldest son should pay them 1100*l.* in lieu of each 100*l.* per ann. And he devised his said manors of *Northwick*, and *North* and *Middle Littleton*, and all other his lands in *Blockley* and *Hampton*, subject to the charges in his will, to his eldest son *James*, afterwards Sir *James Rusbout*, for life, without impeachment of waste; remainder to his first and other sons in tail male successively; remainder to the appellant Sir *John*, the testator's second son for life; remainder to the appellant's first and other sons in tail male successively; remainder to the testator's son *George*, for life; remainder to his first and other sons in tail male successively, with divers remainders over. And he devised his manors of *Egerton* and *Swingfield*, and all other his lands in *Kent*, to his executors, in trust, that they should sell the same, and out of the purchase money pay all his debts and legacies, which his personal estate and his lands before appointed for a term of years, should not be sufficient to pay; and after such debts and legacies were paid or secured, the surplus, together with the growing profits of all his estates appointed for the maintenance of his eldest son, and all other monies and proceed whatsoever, should, by his executors, be laid out in the purchase of lands of inheritance, or copyhold or leasehold estates, held of any Bishop, or Dean and Chapter, lying in or near *Blockley*, or any other of his estates, in the name and for the use of such eldest son, as should be living at the time of such purchase, and the heirs male of his body; remainder to his daughter *Elizabeth* for life; remainder to her first and every other son in tail male successively; remainder over to his own right heirs. And the testator gave to his sons *John* and *George* 500*l.* a-piece, over and above 500*l.* a-piece which had been given them by a deed

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deed dated the 6th of *October*, 1694, payable at 21; and he gave to his daughter *Elizabeth* 4000*l.* to be paid at her age of 21, or marriage; and made Sir *Rushout Cullen* and *Richard Freeman*, Esq; executors.

The testator, on the 4th of *February*, 1697, made a codicil to his will; whereby, among other things, he willed, that all his lease lands in *Blockley* in *Worcestershire*, should go along with his manor of *Northwick* and free lands there, and attend the limitations thereof, so far as by law they might; subject to the payment of his debts and legacies, and such other charges and contingencies, as *Northwick* was subject to by the will and codicil. And taking notice that he had, by his will, devised his lands in *Kent* to his executors to be sold, and the surplus money, after debts and legacies paid, together with the growing profits, to be employed for the purposes therein mentioned; he did by the said codicil direct, that such estate so to be purchased, should be purchased in the name and to the use of his son *James*, and the heirs male of his body; remainder to his son *John*, and the heirs male of his body; remainder to his son *George*, and the heirs male of his body; remainder to his daughter *Elizabeth* for life, and with such remainders over as were mentioned in his will. And he gave to his said sons *John* and *George*, 500*l.* a-piece, more than the 500*l.* a-piece given them by his will.

The testator soon afterwards died, leaving such issue as aforesaid; and thereupon the executors proved his will and codicil.

Sir *James Rushout*, the testator's eldest son, in consideration of a marriage between him and *Arabella*, the daughter of Sir *Thomas Vernon*, and of 5000*l.* portion, by lease and release, dated the 17th and 18th of *January*, 1699, and by a common recovery, conveyed the manors of *Maylards*, *Overswell* and *Stone*, and all the lands thereto belonging, to the use of himself for 99 years, if he should so long live, without impeachment of waste; remainder to trustees to support the contingent remainders; remainder to the use of the said *Arabella* for her life, for her jointure; remainder to the use of Sir *Thomas Vernon* and Sir *Rushout Cullen* for 99 years, for raising such portions for the younger children of that marriage, as the said Sir *James Rushout* should appoint, not exceeding 5000*l.*; remainder to the use
of

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of the first and other sons of Sir *James* by the said *Arabella*, in tail male successively; remainder to the use of *Thomas Vernon* and *Richard Freeman* for 500 years, upon the trusts after expressed; remainder to the use of the right heirs of Sir *James Rushout*. And it was thereby declared, that the said term of 500 years was upon trust, that the trustees should, out of the rents and profits of the premises, or by lease or mortgage thereof, raise and pay the several sums following, viz. in case Sir *James* should have issue by *Arabella* one or more daughters, and no issue male; or if his issue male should die without issue before the age of 21; that then the trustees should raise 5000*l.* for such daughter, if but one; and if more than one, then 5000*l.* to be divided between them, to be paid at 18, or marriage; and 100*l.* per ann. for maintenance in the mean time, if but one daughter; and if more than one, then 200*l.* per ann. between them.

The manor of *Egerton* in *Kent* was afterwards sold, towards payment of Sir *James* the father's debts; and Sir *James* the son suffered a common recovery of the manor of *Harrow*, and declared the use thereof to himself in fee.

On the 12th of *November*, 1705, Sir *James* the son made his will; and thereby devised the manor of *Harrow*, and all the lands and hereditaments thereto belonging, to Sir *Rushout Cullen*, *Thomas Vernon* and *Richard Freeman* (whom he made executors) for 99 years, upon the trusts after expressed; remainder to his son *James*, the respondent's brother, in tail male; remainder to his the testator's brother Sir *John*, the appellant, in tail male; remainder to his brother *George* in tail male; remainder to his own right heirs.

The trusts of the 99 years term were declared in the words following, viz. "And as to the term of 99 years limited of the said manor and premises, my will is, and I do declare, that the same is and shall be in trust and to the intent, that my said executors and the survivor of them, and the executors, administrators and assigns of such survivor, shall, out of the rents, issues and profits of the said manor, and the lands, tenements and hereditaments thereunto belonging, or by leasing or demising the same, or any part thereof, or by mortgaging the whole or any part thereof, or by all or any or
" such

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“ such of the said ways or means or otherwise, as shall be
 “ needful and expedient, raise and pay such portion and main-
 “ tenance to and for my daughter *Elizabeth Rushout*, as is
 “ herein after limited and appointed; (that is to say) the sum
 “ of 5000*l.* which I give my said daughter for her portion,
 “ to be paid her when she shall attain the age of 21 years, or
 “ be married, which shall first happen: And if my said daugh-
 “ ter shall happen to die before her said portion shall become
 “ due and payable, according to the limitation herein before
 “ in that behalf expressed; that then and in such case, the said
 “ 5000*l.* shall not be raised, but shall cease or remain, and
 “ belong to such person and persons as shall be entitled to the
 “ reversion and inheritance of the said premises, expectant
 “ upon the said term of 99 years, by virtue of the limitation
 “ aforesaid.—And upon this further trust, that the said trust-
 “ tees shall, by all or any of the said ways or means, raise and
 “ pay to and for my said daughter for her maintenance, the sum
 “ of 60*l.* *per ann.* at two usual days or times of payment in
 “ the year, (that is to say) the feast of the Annunciation of
 “ our blessed Lady Saint *Mary* the Virgin, and the feast of Saint
 “ *Michael* the Archangel, by equal portions, without any defal-
 “ cation or abatement, until she arrive to the age of 10 years;
 “ and from and after her age of 10 years, the sum of 80*l.* *per*
 “ *ann.* until she arrive to the age of 15 years; and from thence,
 “ until her portion shall be due and payable, the sum of 100*l.*
 “ *per ann.* in manner aforesaid, and without any defalcation or
 “ abatement whatsoever: The first of such payments to begin
 “ and be made, on the first of the before mentioned feasts, that
 “ shall next happen after my decease.—Provided always, and
 “ my will and meaning is, that if my said son *James Rushout*,
 “ or such other person or persons to whom the freehold or
 “ inheritance of the said manor, lands and premises shall apper-
 “ tain, by virtue of the limitations aforesaid, shall pay, or cause
 “ to be paid unto my said daughter, the said sum of 5000*l.*
 “ when she shall come to the age of 21 years, or be married,
 “ which shall first happen; and shall also pay the said several
 “ sums for the maintenance of my said daughter in the mean
 “ time, and until her said portion shall become payable as afore-
 “ said; that then and from thenceforth, the said term of 99
 “ years limited to my said executors, shall cease, determine
 “ and be utterly void, to all intents and purposes whatsoever.
 “ —Provided further, that if my said daughter shall, at any
 time

“ time hereafter legally demand and insist upon any portion or
 “ sum of money, to be paid to her by means or by virtue of
 “ any deed of settlement, made by me on the intermarriage of
 “ her mother, my dearly beloved wife, now deceased, (the
 “ contents of which settlement I may have forgot, and by reason
 “ of my present illness cannot immediately refer to) that then
 “ my said daughter shall have no benefit by this my will; it
 “ being my true intent and meaning, that she should have the
 “ sum of 5000*l.* to her portion, and no more.”

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On the 2d of *December*, 1705, the testator made a codicil to his will; wherein he took notice of his devise of the manor of *Harrow* to his executors for 99 years, upon trust for the raising and paying to his daughter, for her portion, 5000*l.* at such time as therein mentioned; and from and after the determination of that term, to his son *James* in tail male; with such other remainders over, as in the will are mentioned; and then by this codicil he expressed himself as follows, *viz.* “ Now I
 “ the said *James Rushout*, being of sound mind, memory and
 “ understanding, praised be Almighty God, do, upon more
 “ deliberate thought and consideration, add this, by way of
 “ codicil to my said will, which shall be taken as part thereof;
 “ and do hereby declare and appoint, that if my said son shall
 “ happen to die, before he comes to the age of 21 years, with-
 “ out leaving issue male of his body, lawfully begotten, that
 “ then and in such case, the trust of the term of 99 years
 “ limited to my said executors as aforesaid, shall likewise be,
 “ for raising and paying my said daughter, the sum of 3000*l.*
 “ above and besides the said sum of 5000*l.* which I have given
 “ and devised to her in and by my said will, and to be paid in
 “ like manner.”

The said Sir *James Rushout* soon afterwards died; leaving issue Sir *James* his only son, and the respondent *Elizabeth* his only daughter: And on the 21st of *September*, 1714, Sir *James* the son died an infant, without issue and intestate, leaving the respondent his sister and heir; who thereupon became seised in fee in possession, of the manors of *Maylards*, *Overswell* and *Stone*; and being heir general both of her brother, father and grandfather, she also became intitled to all such real estates as they died seised of in fee; but the manor and lands of *Harrow* came to the appellant, under the limitations of his said brother's will.

1725.

The respondent, in *Easter* term, 1714, and during her infancy, exhibited her bill in Chancery, against the appellant and the executors of her father and grandfather and others; to have an account of the several trust estates created by the will of her grandfather, and of the personal estates of her said brother, father and grandfather; and for the recovery of the leasehold estates in *Blockley*, and to ascertain her portion, and the legacies to which she was entitled under her father's settlement, will and codicil, and for the arrears of her maintenance. To which bill the appellant having put in his answer, afterwards exhibited a cross bill against the respondent and others, insisting, that the respondent was only entitled to one sum of 5000*l.*; and that the appellant's estate ought not to be charged with the payment of any of the said sums of 5000*l.* 5000*l.* and 3000*l.*

On the 24th of *April*, 1716, both causes were heard together before the Lord Chancellor *Cowper*; when his Lordship declared, that the respondent was not entitled to 5000*l.* by the settlement of her father, and also to the 5000*l.* and 3000*l.* by his will and codicil; and was of opinion, that the descent to her of the three manors of *Maylards*, *Overswell* and *Stone*, on which the said 5000*l.* were charged by the settlement, was no extinguishment of the contingent sums of 5000*l.* by the settlement, or of the 5000*l.* and 3000*l.* given by the will and codicil; and that the said 5000*l.* and 3000*l.* given by the will and codicil, were only to be extinguished by the respondent's making her election, when she came to the age of 18, whether she would choose the first 5000*l.* by the settlement, or the 5000*l.* and 3000*l.* given her by the will and codicil, payable at her age of 21, or marriage; but if she should elect to take the 5000*l.* by the settlement, she ought not to have the 5000*l.* and 3000*l.* by the will and codicil, or either of those sums; and if she should elect to take the said 5000*l.* and 3000*l.* by the will and codicil, in that case his Lordship declared, that the 8000*l.* was not extinguished by the descent to her of the said three manors, which were charged with the 5000*l.* by the settlement. As to the provision of maintenance for the respondent, made by the will, his Lordship declared, that the same being payable yearly, and at different rates, according to the age of the respondent, did not depend upon the same contingency; but was meant by the will and codicil, to be vested in the devisee for maintenance, till the contingency happened; and that there-

fore the same ought to be applied according to the will and codicil, with respect to the respondent's attaining her several ages therein expressed; and did order and decree the same accordingly. And it was referred to the Master, to take an account of the rents and profits of the real estate, during the life of Sir James, the respondent's brother, and of his personal estate, and also of the personal estate of his father devised to him; and to the end it might appear what was such personal estate of the father, the Master was to take an account of the rents and profits of the trust estate, until Sir James the father attained his age of 24, and to see whether Sir James the father wasted any of the personal estate of Sir James the grandfather, which was by him devised to Sir James the father, for payment of his brothers and sisters portions. If the Master should find that Sir James the father misapplied the personal estate of his father, or the rents and profits of the trust estate by him received, till his age of 24; then the personal estate of Sir James the father was, in the first place, to go to make good such misapplication; his Lordship declaring, that the respondent was entitled to no more of the personal estate of Sir James the father, than would be afterwards remaining; and that such personal estate so remaining did belong to the respondent. And if the personal estate of Sir James the father should not be sufficient to make good such misapplication; then it was decreed, that the 99 years term in the premises at Harrow, should be applied to make good the deficiency. And Sir James, the brother of the respondent, being tenant in tail, his Lordship declared, that the chattel leases did belong to him, and were part of his personal estate; and if there were any leases for lives, or descendible freehold leases, which had been taken instead of such leases for years, they ought to go as the leases for years, and were also part of the personal estate of Sir James, the respondent's brother; but if there were any descendible freehold leases, of which Sir James the grandfather was seised at the time of making his will, his Lordship declared, that they belonged to the appellant, as tenant in tail; and ordered that the Master should look into the leases, and see to whom they did belong. And it was decreed, that the parties who had received the rents and profits of the three manors, which were descended to the respondent, should account before the Master to her for the same; and the executors were also to account for such part of the personal estate

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estate as they had received: And what upon the account should be found coming to the respondent, over and above what should be allowed for her maintenance, was to be brought before the Master, to be by him put out at interest from time to time, on good government or other security, for the benefit of the respondent; and the Master was to tax all parties their costs, which were to be paid them out of the said estate.

The respondent having attained her age of 18, did by a writing under her hand, dated the 6th of *July*, 1721, in pursuance of the decree, elect to take the 5000*l.* and 3000*l.* given and devised to her by the will and codicil of Sir *James Rushout* her father; and upon the same day, this writing was left with the appellant.

T. Lutwyche.
C. Talbot.

The respondent having attained 21, and being about to carry this decree into execution, the appellant thought proper to appeal from it; insisting, that she was not entitled to, nor was it designed that she should have any more than one sum of 5000*l.* and for which she had received satisfaction, by having the three manors of *Maylards*, *Overswell* and *Stone*, which were charged therewith, and were of the yearly value of 800*l.* That the respondent having a larger maintenance out of these manors, than was provided for her by her father's will; the appellant ought not to have been decreed to pay or allow any maintenance to her, out of the manor of *Harrow*. That the chattel leases were, by the decree, declared to belong to the respondent's brother, and to be considered as part of his personal estate; whereas, by the will and codicil of Sir *James* the grandfather, these leasehold estates were directed to go along with his manor of *Northwick* and free lands there, and attend the limitations thereof; so far as by law they might; and therefore they ought to have been settled in such manner, as that the appellant might have the benefit thereof. That there was no direction given by the decree, touching the sale of the manors and lands in *Kent*, or the money arising by such sale; whereas that money ought to have been applied, according to the will and codicil of the appellant's father. And therefore it was hoped, that the decree would be reversed; and such directions given, as were agreeable to equity and justice.

To

To this it was answered on the other side, that as Sir James *Rushout*, the respondent's father, after suffering a recovery of the manor of *Harrow*, was seised thereof in fee, and had an absolute power to charge it in such manner as he thought fit; so he had accordingly by his will and codicil, charged this manor with the payment of the said several sums of 5000*l.* and 3000*l.* to the respondent at her age of 21, or marriage; and had thereby transferred the charge of 5000*l.* from the three manors comprised in his marriage settlement, to the said manor of *Harrow*, devised by his will. That with the terms of this will, and also of the decree, the respondent had complied, by making her election in the manner before mentioned; and the appellant had no reason to complain of the respondent's father for making this will, since if he had made no will, the respondent, as the heir at law of her said father and brother, and not the appellant, would have been entitled to the fee simple and inheritance of the said manor of *Harrow*. That the respondent's father had, by the express words of his codicil, charged the 99 years term in this manor, with the more effectual and further securing the payment of all such legacies, as were given to his brothers *John* and *George*, and his sister *Elizabeth*, by his father's will; and in conformity thereto, the decree had gone no further, than to charge the said term in *Harrow* with the deficiencies of the trust and personal estate of Sir James the grandfather, so far only, as to make good the payment of those legacies; nor did the respondent insist upon any more, under that part of the decree. That all the leasehold estates for years, being devised by the will of Sir James the grandfather, in trust, to attend the manor of *Northwick* and the limitations thereof, so far as by law they might; and Sir James the grandson becoming entitled to an estate tail in this manor of *Northwick*, he thereby became entitled to the absolute estate and interest in all these leases for years; for they could not, by the rules of law or equity, bear any limitations over after an estate tail, because it would introduce the inconvenience of a perpetuity, which neither law or equity ever tolerate. That it was conceived not to be proper for the Court of Chancery, to give any direction for the sale of the manors and lands in *Kent*, or touching the application of the surplus money to be raised by such sale, until the account directed by the decree of the rents and profits of the trust estate, and of the personal estate of Sir James the grandfather, and the misapplications by Sir James

P. Yorke.
W. Peere
Williams.

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the father, and of his personal estate liable to make good the same, were taken; in regard, it could not till then be known, how much of the lands in *Kent* would be necessary to be sold, or what the surplus money would amount to.

DECREE affirmed.
Jour. vol. 22.
p. 607.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree complained of should be affirmed: Nevertheless it was declared, that either party should be at liberty to apply to the Court of Chancery, touching the sale of the manors of *Egerton* and *Swinfield*, in the county of *Kent*, and other the lands in the said county, of the late Sir *James Rushout*; and likewise touching the monies arising by such sale, and by the rents and profits thereof.

Case 19.

John Tutt,

Appellant.

John Mercer,

Respondent.

2d March, 1725.

ON the 5th of *August*, 1720, the respondent borrowed of the appellant 1100*l.*; and for securing the repayment thereof, not only gave him a bond in the penalty of 2200*l.* but likewise deposited with the appellant, a receipt for 500*l.* in the second money-subscription, taken in by the *South-sea* company, numbered 195: And, by an indenture of defeazance of the same date, the appellant covenanted and agreed with the respondent, that if he paid the 1100*l.* pursuant to the condition of the bond; then the appellant would assign to the respondent the said subscription receipt, and also pay and account with him, for all dividends and payments that should be made thereon in the mean time. And the respondent agreed, that if the said subscription receipt should be of less value than 1200*l.* before the bond was discharged, that the appellant should sell the same towards satisfaction of the debt, in case the respondent should not give such security as should be approved of by the appellant, within three days after notice in writing; and that if default should be made in payment of the 1100*l.* contrary to the said bond, then it should be lawful for the

appellant

appellant to sell the said subscription receipt, and to apply the money arising thereby towards payment of the said 1100*l*. And the appellant agreed to account with the respondent for the overplus raised by such sale.

This sum of 1100*l*. being made payable on the 5th of November then next, the interest thereof for that time being three months was calculated, and the appellant stopt 55*l*. as the amount of such interest; so that the respondent received no more than 1045*l*. and for that reason no mention was made of interest in the bond.

The subscription receipt so deposited, was expressly described in the defeazance, to be marked or numbered 195; and the number thereof was carefully compared and examined with the receipt, before the executing of the indenture: And it was also fully proved in the cause, by the person who engrossed the said indenture and examined the number of the receipt. But before the 1100*l*. became payable, the price of stocks having considerably fallen, and the appellant pretending to be uneasy thereat; the respondent made him a mortgage of an estate in *Cbildwell* in the county of *Lancaster*, of 45*l*. per ann. for better securing the payment of the said 1100*l*.; and on the 21st of April, 1722, the respondent paid the appellant 100*l*. in part of the principal money which he then thought to be due and owing from him.

But some time afterwards the respondent discovered, that within four or five days after the pledging of the said subscription receipt, No. 195, with the appellant for the purposes aforesaid, the same was sold for 2700*l*.; and the appellant refusing to make the respondent any satisfaction on account thereof, he, in November, 1722, exhibited his bill in the Court of Exchequer against the appellant, praying that he might come to an account with him, for the money raised by sale of the said 500*l*. subscription receipt, and pay him the overplus, after a deduction of what was due to him in respect of the 1100*l*. so borrowed of him as aforesaid, according to his own agreement in the said defeazance; and likewise that he might assign the said mortgage.

To

1725.

To this bill the appellant put in a first and second answer; and by both of them positively swore, that the 500*l.* subscription receipt pledged or deposited with him by the respondent, was No. 194, and not No. 195; that the inserting No. 195, in the indenture of defeazance, was by mistake; that the said subscription receipt No. 194, was on the 22d of *September*, 1720, by inadvertency, instead of another receipt in the same subscription, sold to Sir *Harcourt Masters* for 595*l.* and no more; that the appellant had, till the 30th of *April*, 1722, kept by him a receipt in the same subscription, No. 338, for 500*l.* which he was ready to have delivered to the respondent, in case he had before that time paid him the remainder of the 1100*l.* and interest; but that the respondent failing in payment thereof, the appellant had, on the said 30th of *April*, 1722, sold and disposed of the said subscription receipt No. 338, for 95*l.* 12*s.* 9*d.* and no more; that one receipt was as good as another, where both were for the same sum, and in the same subscription; and therefore insisted, that the appellant ought not to allow the respondent, any more than the sum of 95*l.* 12*s.* 9*d.* in respect of the subscription receipt so pledged or deposited.

The appellant also brought a cross bill against the respondent; praying, that he might be obliged to accept of the said sum of 95*l.* 12*s.* 9*d.* in satisfaction for the subscription receipt, so pledged or deposited with him.

To this bill the respondent put in his answer, and thereby expressly swore, that the 500*l.* subscription receipt pledged or deposited with the appellant, was No. 195, and not No. 194; that there was no mistake in the description thereof, inserted in the defeazance; and that the appellant had actually sold the said subscription receipt, No. 195, for the sum of 2700*l.* and therefore insisted, that the appellant was and ought to be answerable to him for that sum.

The appellant never thought fit to proceed further in this cross cause; but the original cause being at issue, and divers witnesses examined on both sides, the same was heard on the 22d of *February*, 1723; when the Court directed, that a trial at law should be had between the respondent and the appellant, upon a feigned action, to be brought in the office of Pleas of that Court, wherein the issue was to be, whether the second subscription

scription receipt for 500*l.* in the *South-sea* company, deposited by the respondent with the appellant, was numbered 195 or 194? Which trial was to be at the first sittings in *Middlesex*, in *Trinity* term then next, and proper directions were given for the trial of the said issue; and after such trial, the cause was to stand in the paper, to be heard on the equity reserved.

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A trial at law was accordingly had, and upon a full defence made, and examination of witnesses on both sides, which lasted a considerable time, the jury brought in their verdict for the respondent; *viz.* that the subscription receipt by him deposited with the appellant, was No. 195, and not No. 194.

On the 4th of *July*, 1724, the cause was heard upon the equity reserved; when it was decreed, that the appellant should account with the respondent for the sum of 2700*l.* for which the said subscription receipt, No. 195, was sold, and interest for the same, from the 9th of *August*, 1720, the time when it was sold; as likewise for the sum of 100*l.* paid by the respondent to the appellant, on the 21st of *April*, 1722, and the interest thereof; and that the mortgage deed, bond and defeazance, given by the respondent to the appellant, and by order brought into Court, should be forthwith delivered up to the respondent to be cancelled: And for the better taking of the said account, it was referred to the Deputy Remembrancer, to settle what was due for the interest of the said 2700*l.* and 100*l.*; who, in taking the account, was to deduct 1100*l.* and the interest thereof to the time of the sale of the said subscription receipt, out of the said 2700*l.* and 100*l.* and interest; and the Deputy was also to tax the respondent his costs, both at law and in equity.

On the 25th of *January*, 1724, the Deputy Remembrancer made his report; and thereby certified to be due to the respondent from the appellant, the sum of 2062*l.* 13*s.* 8*d.* $\frac{1}{2}$. after the several deductions and allowances by the decree directed to be made: And on the 8th of *February* following, the report was duly confirmed; and it was ordered, that the appellant should pay to the respondent the said 2062*l.* 13*s.* 8*d.* $\frac{1}{2}$. in three months after the date thereof, with interest for the same, from the 23d of *October*, 1724, to which time the interest for the said 2700*l.* was computed by the Deputy Remembrancer;

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and that the mortgage deed, bond and defeazance, given by the respondent to the appellant, should be forthwith delivered up to the respondent.

P. Yorke.

C. Wearg.

From this decree and order, the appellant appealed; insisting, that there was no manner of proof in the cause, for what sum the subscription receipt, No. 195, was sold; or that it was ever sold at all, and much less by the appellant. That he kept another subscription receipt by him, to be delivered to the respondent, in case he had paid the money due to the appellant, of equal value with that deposited by him; and there was no more difference between one subscription receipt and another for the same sum, than there was between one 100*l.* stock, and another 100*l.* stock. That under these circumstances, there was no foundation for a Court of Equity, to give the respondent such relief as had been decreed him; and therefore it was hoped, that the decree would be reversed, and an account directed to be taken of what was due to the appellant for principal, interest and costs, deducting the 95*l.* 12*s.* 9*d.* received by him for the sale of the subscription receipt No. 338; and that upon payment of what should be so reported due, by such time as should be appointed for that purpose, the respondent might be relieved against the penalty of the bond, and the mortgaged estate be reconveyed; but in default thereof, that the respondent's bill might be dismissed with costs.

T Lutwyche.

C. Talbot.

On the other side it was contended, that the decree, order and proceedings were just and equitable; for that it did not appear, nor was proved in the cause, when, or at what time the appellant first had the subscription receipt No. 338, or how long he kept it by him; and therefore he might, consistently with his answer, have bought in that receipt at a low price, after he had sold out the respondent's receipt No. 195, for 2700*l.* That this receipt was fully proved to have been actually sold for that sum, and therefore no issue was needful to be directed, nor was any prayed, or insisted on, to try that fact; the only doubt with the Court being, whether the receipt, No. 195, was deposited by the respondent; because the appellant might have come by it some other way. That the appellant not only acquiesced under the decree, but likewise made a full defence, both at the hearing of the cause, and at the trial of the issue; and afterwards, when the cause came back, upon the

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the equity reserved. That the decree was only conformable to the appellant's agreement, who covenanted by the defeazance, that if he sold the subscription receipt, N^o. 195, therein mentioned to be deposited with him, and so found to, have been upon an issue directed only for that purpose; he would account with and pay the respondent, the surplus of the money for which he should sell the same, after a deduction of what was due to him; and if there had been no such covenant, yet the appellant ought nevertheless to be accountable to the respondent, for the money raised by sale of the said receipt; and therefore it was hoped, that the appeal would be dismissed with costs.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed: And it was further ORDERED, that the appellant should pay to the respondent, the sum of 40*l*. for his costs in respect of the said appeal.

DECREE
affirmed.
Jour. vol. 22.
p. 608.

The Right Honourable *Washington Earl Ferrers*, } Appellant.

Case 20.

The Right Honourable *Selina Countess Dowager Ferrers*, Relict of *Robert Earl Ferrers*, deceased, the Honourable *Robert Shirley*, *George Shirley*, *Sewallis Shirley* and *John Shirley*, Sons of *Earl Robert* by the said Countess } Respondents.
his Wife, Infants, *Sir George Beaumont*, Bart. *George Townsend*, Esq; and *Thomas Harlewin*, Gent. Executors and Trustees of *Earl Robert*, and *Rowland Cotton*, Esq;

8th March, 1725.

ROBERT *Earl Ferrers*, being seised of an estate of near 10,000*l*. per ann. and being desirous to make some provision for the respondent his wife and his children by her; by lease

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lease and release dated the 2d and 3d of *March*, 1713, conveyed to trustees, his estate in the county of *Warwick*, to the use of himself for life; remainder to the respondent *Robert Shirley* for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of *Robert* in tail male; with like remainders to the respondents his younger sons, and their sons in tail male; remainder to his own right heirs.

The said Earl, by another deed dated the 19th of *January*, 1714, settled his estate in *Ireland*, after his own decease, to the use of the respondents his sons by the Countess in tail male, as tenants in common; with remainder to his daughters by her in like manner.

By other deeds of lease and release, dated the 22d and 23d of *November*, 1717, the said Earl conveyed to trustees and their heirs, all his estates in the counties of *Leicester*, *Derby* and *Nottingham*, to the use of himself for life; remainder, as to the premises in *Derby* and *Nottingham*, to *Rowland Cotton* and *Samuel Sheppard*, their executors, &c. for 1000 years, in trust for the Earl, his executors and assigns: And as to the manor and lands of *Ragdale*, *Ratcliffe*, *Willows* and *Thrushington*, being part of the premises in the county of *Leicester*, after the said Earl's death, to the use of the Countess *Selina* his wife for life, if she continued his widow and unmarried; and as concerning the same, after her death or marriage, and as for the other premises in the county of *Leicester*, after the Earl's death, and also all the premises in the counties of *Derby* and *Nottingham*, after the determination of the 1000 years term, to the use of the appellant for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the appellant; with other remainders over.

By other indentures of lease and release of the same date, the Earl conveyed his estate in the county of *Stafford*, to the use of himself for life; and after his decease, to the use of *Samuel Sheppard* and *George Townsend*, their executors, &c. for 1000 years, without impeachment of waste, in trust for the Earl, his executors, &c. and after, to the use of the appellant for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail male; with other remainders over.

The Earl, by his last will, attested by three witnesses, and dated the 25th of *November*, 1717, after reciting the limitations by the first mentioned deed of release of the 23d of *November*, of the premises in the counties of *Derby* and *Nottingham* to *Cotton* and *Sheppard* for 1000 years, in trust for the Earl, his executors and assigns; devised and appointed, that the said *Cotton* and *Sheppard*, their executors, &c. should so stand possessed thereof, upon trust, out of the profits to pay yearly 100*l.* to each of his sons, *Henry*, *George*, *Sewallis* and *John*, and all other sons he should have by his then wife during their several lives, free from taxes. And after payment of his debts and legacies, the testator gave all the residue of his personal estate, to the respondents *Sir George Beaumont*, *George Townsend*, *Samuel Sheppard* and *Thomas Harlewin*, whom he made his executors; upon trust, during such time and times, as there should arise and happen any suit or controversy between the testator's said wife, and any or either of his sons by his first wife, or any of their issue, touching the settlement or provision he had made for her by the indentures of the 22d and 23d of the then present month of *November*; to pay or cause to be paid out of the same unto his wife, the yearly sum of 1000*l.* by quarterly payments, until such dispute, suit or controversy should be fully determined; and so *toties quoties* as any such dispute, suit or controversy should arise and happen. And he further willed, that the overplus of his personal estate should be laid out and disposed of by his executors, in the purchase of lands in *England*, and settled to the same uses as were limited of his estate in the county of *Warwick*, by the indenture of release of the 3d of *March*, 1713. And after reciting, that by the said indentures of lease and release of the 22d and 23d of *November*, 1717, he had conveyed and settled his estate in the county of *Stafford*, after his own decease, to the use of the said *Sheppard* and *Townsend*, their executors, &c. for 1000 years, in trust for himself, his executors and assigns; the testator by his said will devised, directed and appointed, that *Sheppard* and *Townsend* and the survivor of them, his executors and administrators, should so stand possessed of the said estate, upon trust, for the more effectual securing the payment of his debts, and the annuities, legacies and sums of money directed to be paid by his will; and upon further trust, by and out of the said *Staffordshire* estate, and the rents and profits thereof, or by sale

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or mortgage thereof, for the said term of 1000 years, to raise and levy so much money as should, from time to time, be sufficient to indemnify, secure and save harmless his said wife, and all and every his children by her, and all and every his trustees, in any provision or settlement he had made for the benefit of her, them, or any of them, by deed or deeds, or by his said last will, and also his executors of, from and against all costs, damages, troubles, losses and expences which she, they, or any of them should sustain, or be put unto, for or by reason of any action or actions, suit or suits, either in law or equity, which might or should be commenced, or prosecuted against her, them, or any of them, for or on account of any settlement, annuity, legacy or provision, which he had, or should make, grant or provide for his said wife, or any of her children by him, and to pay and apply the same from time to time accordingly: The testator thereby expressing it to be his intention, that all such settlements, provisions, annuities, gifts or bequests, should be quietly held and enjoyed by them respectively, without any let, suit or disturbance, of any of his children by his former wife, or any other person or persons claiming by, from, or under them, or any of them; or in default thereof, that whatsoever loss his said wife, or any of his children by her, should sustain by reason of such let, suit or disturbance, should be made good to her and them by his said trustees, out of the said *Staffordshire* estate, so limited to them for the said term of 1000 years. And from and after these trusts should be fully performed, then the trustees were to stand possessed of the said *Staffordshire* estate, for the residue of the said term, in trust to attend the reversion and inheritance, expectant on the determination of the same term.

On the 25th of *December*, 1717, the Earl died; and he having by a clause in his will, and also in the deed, whereby the *Leicestershire* estate was settled on the respondent the Countess, directed that she should release all dower out of his estate; she accordingly executed a deed for that purpose.

Soon after the Earl's death, the appellant, as his eldest son and heir, entered upon all the estates designed as a provision for the respondents, and all the other estates of which his father died seised, and also upon the estate in *Ireland*, settled on the respondents his younger sons; Whereupon, in *Trinity* term, 1719, ejectments were brought for recovery of those estates;

estates; but the appellant, instead of trying the title at law, gave judgment in all the ejectments, with stay of execution for a limited time.

And in *Michaelmas* term, 1719, a little before that time was expired, the appellant exhibited his bill in Chancery against the respondents; stating, that by indenture dated the 26th of September, 1678, the late Earl *Ferrers* was seised of the estates in the counties of *Leicester*, *Derby*, *Warwick* and *Nottingham* for his life; with remainder to *Robert*, his then eldest son and heir apparent by *Elizabeth* his first wife, in tail male; remainder to all other the sons of the late Earl by his then wife, in tail male. That by articles dated the 26th of September, 1688, made on an intended marriage, which was afterwards had, between the said *Robert* and *Ann Ferrers*, it was agreed, that within twelve months after *Robert* should attain his age of 21, the said late Earl and *Robert* his son, or one of them, would by fines and recoveries, or otherwise, convey to trustees and their heirs, the said estates in the counties of *Leicester*, *Derby*, *Warwick* and *Nottingham*, to the use of the late Earl for life; remainder to the said *Robert* for life, *sans* waste; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said *Robert* and *Ann* in tail male; remainder to the appellant, the second son of the late Earl for life; remainder to trustees for preserving contingent remainders; remainder to the appellant's first and other sons in tail male; with other remainders over: In which settlement there should, *inter alia*, be contained a power for the late Earl, to revoke or alter all or any of the said uses or estates, except those limited to the said *Robert* and *Ann*, or to the use of the issue of their two bodies:—That *Robert* attained 21 in the year 1694, when the late Earl and he joined in suffering common recoveries of the said estates; but that the said *Robert*, contrary to the articles, was prevailed on by the Earl to join with him in an indenture, dated the 18th of October, 1694, whereby the uses of those recoveries were declared to the use of the said Earl and his heirs; who, by indentures of lease and release, dated the 12th and 13th of November, 1694, for the settling those estates, conveyed the same to trustees and their heirs, to the use of himself for life, *sans* waste; remainder to the said *Robert* his eldest son, and the heirs male of his body; remainder to the appellant his second son, and the heirs male of his body; with like remainders

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remainders to the Earl's other sons, in tail male; remainder to the Earl in fee; with a power therein contained for the Earl, by deed, to revoke all or any of the said uses, and appoint others. That the said *Robert* afterwards died, leaving a son named *Robert*, who also died without issue in the year 1714; whereby the appellant was then next heir male of the late Earl: That the said late Earl did not make any such deeds and will, in favour of the respondents as before mentioned; and therefore the bill prayed, that all those deeds and will might be set aside; and that an injunction might be awarded, to stay the respondents proceedings on the ejectments.

The respondents by their answers to this bill, admitted, that such deeds and articles had been executed, and such recoveries suffered, as in the bill were mentioned; but as to the deed declaring the uses of the said recoveries, the respondents stated, that they had only in their custody a draught or copy thereof, and of which the appellant was so informed before he brought his bill, and that the respondents knew not what was become of the original deed. They also stated, that the late Earl, after the death of his said eldest son *Robert*, and failure of his issue male, did, pursuant to his power, revoke the uses in the deed of the 13th of *November*, 1694, of the said estates, and limit the same to himself and his heirs, before he made the deeds and will as a provision for the respondents his wife and children; and insisted, that the said deeds and will were duly and fairly made, and that they were severally entitled to the estates and provisions thereby settled and appointed for their benefit; but that the appellant had immediately on the late Earl's death, in *December*, 1717, got possession of all those estates, and had ever since withheld the same from them, notwithstanding the information he had received of the respondents right thereto as aforesaid; and that therefore, being thus distressed, they caused declarations in ejectment to be delivered for the same, as above-mentioned.

The appellant having, in the usual manner, obtained an injunction, upon the respondents praying time to answer; they, on the 24th of *October*, 1720, after the answer was filed, moved the Court to dissolve the injunction; whereupon it was ordered, that the respondents should be at liberty to proceed to trial, upon the declarations which had been delivered for the premises in question,

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question, or to bring new ejectments as they should be advised; but the taking out execution was stayed, till the further order of the Court: And it was also ordered, that both sides should, before such trial, produce upon oath before a Master, all deeds and writings in their custody relating to the said premises, to be inspected by either party.

This inspection was accordingly had; and the respondents not finding the original deed for leading the uses of the recoveries suffered in 1694, were advised that they could not proceed on the ejectments; but in regard the late Earl had effectually conveyed and subjected his estate in *Staffordshire*, which he had an undoubted power over, for the making good his settlements and provisions for the respondents his wife and children, out of the estates in the other counties; the respondents were advised to deliver ejectments for the *Staffordshire* estate, which the appellant, on the Earl's death, had got possession of, as well as of the other estates, in order to obtain satisfaction of their demands, according to the late Earl's will.

Ejectments were accordingly delivered for the *Staffordshire* estate, and by rule of Court, the same were to be tried in *Michaelmas* term, 1723; but about a fortnight before the day of trial, the appellant filed a supplemental bill, charging, as new matter, that the late Earl's personal estate was, by his will, made liable in the first place to make good the provisions made for the respondents; and that the same being sufficient for that purpose, no trial ought to be had, touching a satisfaction of any of the respondents demands out of the *Staffordshire* estate, until an account was taken of the personal estate; and in case the same should not be sufficient to answer such demands, then, until a satisfaction could be sought for out of the estates in the counties of *Derby* and *Nottingham*, subject to the term of 1000 years limited to *Cotton* and *Shephard*, which was by the will directed to come in aid of the personal estate; and the appellant thereby insisted, that he ought not to be stripped of the possession of the *Staffordshire* estate, until it should appear that such other provisions proved deficient. But should such be the case, then upon a fair trial to be had for any of the said estates in the counties of *Leicester*, *Derby*, *Warwick* and *Nottingham*, if it should appear that the late Earl was capable,

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and had duly made such settlements and will, the appellant, by his said bill, undertook to make good all such matters and things to the respondents, as any of them should appear to be entitled to a satisfaction for, out of the said estate in the county of *Stafford*; the personal estate being first accounted for and applied, as by the will was directed.

On the 4th of *November*, 1723, immediately after filing this supplemental bill, the appellant moved the Court for an injunction, to stay the proceedings on the ejectments brought for the *Staffordshire* estate, and that the same might extend also to stay the trial; whereupon it was ordered, that on the appellant's giving judgment in the said ejectments in three days, with a release of errors, an injunction should be awarded till the hearing of the cause, which the appellant was to speed to a hearing; and he was, by consent, not to bring any writ of error, and to deliver possession of the premises, or any part thereof, from time to time, as the Court should direct.

The respondents soon afterwards put in their answers to the supplemental bill; and thereby insisted, that it was apparent from the will, that no part of the late Earl's personal estate was subject or applicable to make good the settlement of his *Warwickshire* estate by the deeds of *March*, 1713, for the benefit of his son the respondent *Robert Shirley*, and his issue male; nor to make good the annuities of 100*l.* per ann. a-piece to his younger sons the respondents *George*, *Sewallis* and *John Shirley*, by the will directed to be raised and paid out of the Earl's estates in the counties of *Derby* and *Nottingham*, by virtue of the 1000 years term, vested in *Cotton* and *Shephard* by the deeds of *November*, 1717; but that the *Staffordshire* estate was by the will expressly subjected to make good those settlements and provisions, in case the same were withheld, as had been done by the appellant: The respondents also insisted, that no part of the personal estate was, by the will, liable to make good to the respondent the Countess, such provision as the Earl had made for her out of his estate in *Leicestershire*, which was limited to her by the other deeds of *November*, 1717, during her widowhood, or to discharge the *Leicestershire* estate therefrom; but only for the raising and paying out of the said personal estate, the yearly sum of 1000*l.* to the Countess, so long as any dispute, suit or controversy should depend between her and

and any of the Earl's sons by his first wife, touching his said settlement of the *Leicestershire* estate; and which was intended only as her support, until such controversy should be ended and determined.

Both sides afterwards examined their witnesses, and the respondents fully proved the due execution of the said deeds, and also of the late Earl's will, and the value of the several estates settled as a provision on them; and on the 22d of *February, 1724*, the cause was heard before the then Lords Commissioners for the custody of the Great Seal; when it was ordered and decreed, that it should be referred to the Master, to take an account of the rents and profits of the lands, which were settled on the respondent the Countess *Ferrers*, in jointure, and to see what the same amounted to, since the death of the late Earl, after all just allowances; and what the Master should certify due to the respondent for the arrears of her jointure, was to be made good to her out of the *Staffordshire* estate; and the Master was to see what was the annual value of the jointure lands, and to see that lands of the same annual value, in lieu thereof, were settled on her for her jointure, out of the *Staffordshire* estate: And the Master was to take an account of the rents and profits of the *Warwickshire* estate, settled on the respondent *Robert Shirley*, and to see what the same amounted to, since the death of the late Earl, after all just allowances; which were to be made good to the said respondent *Robert Shirley*, out of the *Staffordshire* estate: And the Master was to enquire and see, what the inheritance of the *Warwickshire* estate was worth; and what he should certify the same to be worth, was to be made good out of the said *Staffordshire* estate; and the Master was to see the same, when raised, laid out in a purchase of lands, to be settled to the same uses as the *Warwickshire* estate was settled. And the Master was to take an account of what was due to the respondents the three younger sons of the late Earl, by the respondent the Countess, for the arrears of their annuities of 100*l. per ann.* a-piece, which arrears were to be paid to them out of the *Staffordshire* estate; and the said Master was to see that so much of the *Staffordshire* estate, as should be sufficient to answer the said three annuities of 100*l.* each for the future, should be settled for that purpose. And the Master was to enquire and see, whether the late Earl had a power to make the settlement of the *Irish* estate on the respondents

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respondents his sons; and if he should find he had such power, then the *Staffordshire* estate was to be charged only with what the arrears of the rents of the *Irish* estate since the Earl's death amounted to, after all just allowances made; but if the Master should find, that the Earl had no power to make such settlement of the *Irish* estate, then the persons claiming under that settlement, were to have satisfaction out of the *Staffordshire* estate: And the Master was to settle the value of the inheritance of the *Irish* estate, and what he should certify the same to be, so much money was to be made good, and raised out of the *Staffordshire* estate; and the Master was to see the same, when raised, laid out in a purchase of lands, to be settled to the same uses as the *Irish* estate was settled. And the Master was to see the *Staffordshire* estate, and the timber growing thereon, or so much thereof as should be necessary for discharging what was charged thereon, in respect of the said other estates so settled as aforesaid, sold for that purpose, to the best purchaser or purchasers that could be got for the same, subject to the Countess's jointure, and the annuities to the younger children; but care was to be taken in the sale, that such part as should be most beneficial, should be preserved unsold for the benefit of the person or persons entitled to the remainder, in case there should be no occasion to sell the whole estate: And in case the *Staffordshire* estate should be sufficient to raise the whole that was charged thereon, then no account was to be taken of the rents and profits thereof, which had been received by the appellant; but in case it should not be sufficient to answer all the charges thereon, then the appellant was to account before the Master for the rents and profits thereof received by him, or any other for his use, since the late Earl's death; and the Master, in taking that account, was to make the appellant all just allowances. — And if the *Staffordshire* estate, and the rents and profits thereof, from the time of the late Earl's death, should not be sufficient to answer the said several charges thereon; then the Master was to apportion the said rents and profits, and the money for which the said estate and timber thereon should be sold, between the parties who were to have a satisfaction thereout, in proportion to their several demands, and the deficiency of the estate to answer the same. And the respondents, the executors of the late Earl, were to account before the Master for his Lordship's personal estate come to their hands or use, in which he was to make all just allowances; and

and also to take an account of the Earl's debts and legacies, which were to be paid thereout; and the surplus of the said Earl's personal estate, was to be laid out in a purchase of lands, with the approbation of the Master, to be settled for the uses and purposes directed by the Earl's will: And the Master was to appoint a fit person to be receiver of the rents and profits of the *Staffordshire* estate, in the possession of the appellant, (except the house and park and the grounds therewith used) and such receiver was to give security, to be allowed by the Master; and was thereupon, with the approbation of the Master, to be at liberty to take any legal course to recover the possession thereof from any other persons, in the names of the respondents the trustees; and the Master was to settle an annual value to be paid for the house and park, and grounds used therewith, which was to be paid by the appellant to the receiver: And the said receiver was, out of the rents and profits of the said estate, to pay what the Master should certify due to the respondent the Countess, for the arrears of her jointure, and to the younger children, for the arrears of their annuities; and to the respondent *Robert Shirley*, what should appear due to him, for the arrears of the rents and profits aforesaid: And the Master was to tax the respondents their costs, both at law and equity; which were to be paid out of the *Staffordshire* estate: And it was further ordered, that a perpetual injunction should be awarded, for stay of the respondents proceedings at law, on the ejectments brought by them or any of them, for the estates in the counties of *Leicester*, *Derby*, *Warwick* and *Nottingham*, and all further proceedings at law for the rest of the estates in question.

On the 6th of *March*, 1724, and before this decree was drawn up, the respondents applied for and obtained an order, directing the Master to appoint a receiver; and both sides attending him for that purpose, the Master by his report, dated the 12th of that month, certified that he had appointed one Mr. *William Busby* the receiver; to whom the appellant himself declared he had no objection, save only that he was of the respondent's naming, or their agent, and therefore insisted, that the Master should appoint another; but as Mr. *Busby* was a gentleman of an undeniable character and a good estate, the Master thought fit to appoint him, and he entered into a recognizance with the respondents *Sir George Beaumont*, *Robert Shirley*,

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ley, and another sufficient person, in a considerable penalty for his true accounting.

The appellant however, petitioned the Court to discharge him; but upon full hearing of counsel on both sides, the Court dismissed the petition.

The appellant therefore appealed from the decree, order and report, as being erroneous in the following particulars: I. That the Court of Chancery had not directed an issue at law, to try whether there was any settlement formerly made of the manor and estate at *Chartly*; whereby the same was so settled, as to come to the appellant in tail, or in any other and what manner. II. That directions were given by the decree, touching the *Irish* estate, whereas there was no sufficient foundation for them; there being nothing either in the appellant's original or supplemental bills relating thereto, nor in any of the defendants answers to those bills; save only in the answers of the respondents *Townsend*, the Countess and *Robert Shirley*, to the supplemental bill; wherein they only said, they conceived that no part of the late Earl's personal estate was applicable to make good his estate in *Ireland*, for which they had exhibited a bill against the appellant. III. That in case the *Staffordshire* estate should not be sufficient to answer all the charges thereon, then the appellant was decreed to account for the rents and profits thereof, received since the Earl's death; whereas it was conceived, he ought not to account for any of such rents and profits, or at least only from the time of making the entry upon, and bringing the ejectment for that estate. And IV. for that Mr. *Busby* was allowed the receiver of the *Staffordshire* estate, the appellant's petition touching the nomination of a receiver for that estate was dismissed, and no regard had to the persons who were nominated by him.

P. Yorke.

C. Wearg.

And in support of this appeal it was said, that it appeared from certain letters written by Mr. Serjeant *Bigland*, before September, 1688, that the late Earl told him, the *Staffordshire* estate was settled on Mr. *Robert Shirley*, the appellant's elder brother; and it also appeared from a letter of Dame *Elizabeth Ferrers*, of the 31st of August, 1688, that the Earl had mentioned to her the strict settlement of his estate, and that his paternal estate was settled by his father, and the other part by himself on his marriage; and this paternal estate must mean the *Staffordshire*

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Staffordshire estate. That endeavours were proved to have been used, to conceal or make away with the deeds or settlements of the estates, and even to get in the very draughts of them; and as the indenture of the 18th of *October*, 1694, was not to be found, it might well be presumed, that the settlements of the other estates were lost or destroyed also. That if the late Earl, in his life-time, intended to have made the respondents an effectual provision or settlement, he would primarily have charged the same on the *Staffordshire* estate, if he had been conscious that he had sufficient power so to do; and not have made such provision in the first place out of the other estates, which he could not but know was thereby defective, and liable to be defeated. That it appeared by the deeds and will, on which the respondents founded their charge on the *Staffordshire* estate, that the same was only in the nature of a mortgage or security, in case the other estates proved defective; and the respondents could not but know that the titles were defective, though they were not pleased to discover the same to the appellant; but on the contrary, brought ejectments for those estates, which they afterwards relinquished, and which occasioned the appellant to pay 15,000*l.* to the Lord and Lady *Compton*, or else he had not had one foot of land whatsoever: And as the respondents did not bring any ejectment, or make any entry for several years on the *Staffordshire* estate, they ought not to have any account of profits, but from the time of such ejectment or entry.

On the other side it was contended, that there was no occasion for any issue to be directed, it fully appearing by the deeds produced and read in Court, that the late Earl had an undoubted power over the *Staffordshire* estate, to make the settlement which he had done, for the benefit of the respondents; nor did the appellant or his counsel ever controvert the same, and therefore there could not appear to the Court, any colour or foundation for directing an issue. As to the directions in the decree concerning the *Irish* estate, that estate was sufficiently mentioned in the respondents answers, to be settled by the late Earl upon the respondents his sons, as part of the provisions intended for them; and the *Staffordshire* estate was expressly subjected by the testator's will, to make good all his settlements and provisions whatsoever, for the respondents his wife and children: The decree therefore had done the appellant no hurt in this matter, for it had not determined the title, but only directed

T. Lutwyche.
C. Talbot.

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directed the Master to see whether the late Earl had power to settle the *Irish* estate on the respondents; and if he had, then the *Staffordshire* estate was only to be charged with what the arrears of the *Irish* estate amounted to: But if he should find that the Earl had no power, then the persons claiming under those settlements, were to have satisfaction out of the *Staffordshire* estate; and which directions, were only conformable to the express directions of the testator. That if the *Staffordshire* estate should prove deficient to answer all the charges thereon, it was but reasonable and just, that the appellant, who from the late Earl's death in 1717, got the possession, and had all along received the profits till the cause was heard, should answer and make good to the respondents all that he, in their right, had received; more especially, as he likewise got and held the possession of the other estates, which were immediately settled upon them. That as to the receiver, there could be no colour for an objection; for as he was appointed for the respondents benefit, and as the estate of which he was so appointed receiver, was but a slender fund for their satisfaction; it highly concerned them to get a person named, in whom they could confide, and who would make the most of the estate: That they knew of no other person in the country so proper as Mr. *Busby*, and as undoubted security had been given for his true accounting, if any misbehaviour should appear, the appellant would have his remedy in the Court of Chancery, under the recognizance. That the appellant was in the possession of a large estate, over and above the provisions made for the respondents, and which he might ultimately have, freed from those provisions; the settlement on the Countess being only during her widowhood, and the three small annuities to the three younger sons, only for their lives: But forasmuch as those provisions were for the respondents support and maintenance, and as the appellant had by all possible delays, kept them out of the same for seven years; it was hoped, that the decree and orders would be affirmed, and the appeal dismissed with costs.

DECREE
affirmed.
Jour. vol. 22.
p. 613.

AFTER hearing counsel on this appeal, Mr. Attorney-general, on the part of the appellant, acquainted the House, that the parties were come to an agreement, and that the same was put into writing, and signed as well by the Countess and *Robert Shirley*, as by the Earl: And the counsel for the respondents likewise acquainting the House, that they consented to the said

written

written agreement; the same was delivered in at the bar and read, and after consideration had in relation to this matter, it was ORDERED and ADJUDGED, according to the said agreement, that the decree should be affirmed, with the following directions, viz. "That the possession be delivered of the *Warwickshire* estate to Mr. *Robert Shirley*, before *Lady-day* next; that the possession of the jointure estate in *Leicestershire*, be delivered to the Countess before *Lady-day* next; that the annuities to the younger sons, be charged on the *Staffordshire* estate; that the possession of the *Irish* estate be delivered, before the 1st day of *May* next, to Mr. *Robert Shirley* and his three younger brothers; that thereupon the receiver of the *Staffordshire* estate be discharged, and possession thereof delivered to the Earl before *Lady-day* next; that all arrears, profits and costs, and all other matters in dispute, be referred to the right honourable the Lord Chancellor, Lord Viscount *Harcourt* and Lord *Trevor*, or any two of them, to be adjusted and moderated, as their Lordships shall think fit; and that their Lordships, or any two of them, be desired, for the quieting the family, to propose a plan of an act of Parliament, for settling the jointure estate upon the Lady Dowager *Ferrers*, during her widowhood; the *Warwickshire* estate, according to the uses of the deed of the 3d of *March*, 1713; and the *Irish* estate, according to the deed of the 29th of *January*, 1714; and to secure the annuities to the three younger sons on the *Staffordshire* estate; and to secure the benefit of the term of 1000 years on the *Staffordshire* estate, to the Earl, his executors, or administrators.

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Maurice Wynn, Esq; Son and Heir of } Appellant.
Owen Wynn, Esq; deceased,

Case 21.

Richard Wynn, Gent. — Respondent.

9th *March*, 1725.

ROBERT *Wynn*, Esq; was, in the year 1709, seised in tail of an ancient capital messuage or tenement and demesne lands thereto belonging, called *Maesmochnant*, and of another tenement

Viner, vol. 8.
 p. 373. ca. 18.
 2 Eq. ab. 360.
 ca. 16.

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tenement and lands called *Maes y Criafol*, which had been the estate and inheritance of his ancestors; and of two other tenements called *Bwlch Glas* and *Gwern Vwod*, and several parcels of land, which came into his family long after the other estates, and were gained by the marriage of one of his ancestors with an heiress; also of another tenement, which had been purchased by his father or grandfather: He was also seised in fee of two other tenements and lands, which had been purchased by himself, and never belonged to any of his ancestors; all which premises were lying in the parishes of *Llanrhaiader* and *Llanarmon Mynydd Mawr*, in the county of *Denbigh*. And being so seised, the said *Robert Wynn*, at the Great Sessions holden for the said county, on the 5th of *September*, 1709, suffered a common recovery of all the said premises; and by indenture dated the 12th of the same month, reciting such recovery, declared the uses thereof to be to the use of such person and persons, and for such estate and estates, and in such manner and form, as he the said *Robert Wynn* should, in and by his last will and testament in writing, to be by him signed, sealed and published in the presence of three or more credible witnesses, or in and by any deed or other writing, to be by him executed in the presence of two or more credible witnesses, limit or appoint; and for want of such appointment, to the use of himself, and the heirs of his body; remainder to his brother *Maurice Wynn*, and the heirs of his body; remainder to his cousin *Owen Wynn*, the appellant's father, and the heirs of his body; with remainder to his own right heirs.

On the 25th of *March*, 1717, the said *Owen Wynn*, the appellant's father, died, leaving issue the appellant his only son and heir; and on the 1st of *May* following, the said *Robert Wynn* died, without issue.

Whereupon *Maurice Wynn*, his brother, entered on the estate, as being his heir at law, and also next remainder-man in tail under the said deed; and enjoyed the same till his death, which happened in *March*, 1718; and he dying without issue, and without altering any of the uses limited by his said brother, or doing any act to bar those uses; the respondent entered upon all the premises, as heir at law both of *Robert* and *Maurice Wynn*, and got into his possession all the deeds and writings relating thereto.

In *Michaelmas* term, 1718, the appellant brought his bill in the Court of Chancery against the respondent, for a discovery of the deed declaring the uses of the recovery, and to have it delivered up to him, that he might assert his title to the remainder thereby limited to the heirs of the body of the said *Owen Wynn*.

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The respondent, by his answer to this bill, admitted to have the said deed in his custody, and annexed a copy thereof; but insisted, that *Robert Wynn*, after the execution of that deed, had, on the 12th of *September*, 1713, made his will; and thereby devised all the said premises, by the name of all his estate of *Maesmochnant*, to his brother *Maurice Wynn* and the heirs male of his body; and, failing his heirs, to his cousin *Owen Wynn*, the appellant's father, and the heirs male of his body; and, failing his heirs, to his the testator's own right heirs: That the said *Robert Wynn* and his brother *Maurice*, being both dead without issue, and the uses declared by the deed being revoked by the will, the appellant could derive no title under that deed, nor under the will; in regard the said *Owen Wynn*, the appellant's father, died in the life-time of the testator.

The cause being at issue, came on to be heard before his honour the Master of the Rolls, on the 5th of *June*, 1722; when it was ordered, that both parties should attend the Master, who should examine, whether the whole estate of *Robert Wynn* was known by the name of *Maesmochnant*, or not; and whether the said *Robert* was seised of any other lands, than what were mentioned in the deed of the 12th of *September*, 1709; and whether the whole, or any and what part of the estate of *Robert Wynn* did pass by the bequest in his will, of all his estate of *Maesmochnant*; and to examine what was the yearly value of that part of the estate which lay in *Maesmochnant*, and also of the whole estate, and state the whole matter to the Court. And for the better clearing thereof, the will and all the deeds and writings relating to the said estate, were to be brought before the Master.

The respondent appealed from this order to the Lord Chancellor *Macclesfield*; who, upon hearing the cause on the 8th of *February*, 1723, confirmed the former decree; but without prejudice to the respondent's applying to that Court, after the Master's

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Master's report, for a further enquiry, touching the matters in the petition of appeal mentioned.

The deed of settlement, will and title deeds having been brought before the Master, and several proofs taken in the cause; he, by a special report, dated the 30th of *June*, 1724, certified, that by the said will, deeds and depositions it did appear, that the whole paternal estate of *Robert Wynn*, which came to him from his ancestors, the *Wynns* of *Maesmochnant*, was commonly known by the name of *Maesmochnant* estate; and that *Maesmochnant* was the proper and particular name of the mansion, or chief dwelling house of the family, and not of any township or division of the county:—That the said *Robert Wynn*, at the time of making his will, and suffering the recovery, was seised in fee of two messuages by him purchased, called *Cae Mawr* and *Pen-y-Ford Wenn*, besides those particularly described in the deed declaring the uses of the recovery: And that he conceived it to have been the intention of the testator, by the bequest of all his estate of *Maesmochnant*, to pass his whole paternal estate; which the Master found was, at the said *Robert Wynn's* death, let to his brother *Maurice*, at 120*l.* per ann. but, with the addition of *Cae Mawr*, was then let at 178*l.* 13*s.* 4*d.* per ann.

To this report, the appellant took several exceptions; and on the 15th of *January*, 1724, the cause was heard on the exceptions, and also on the special matter of the report, before Sir *Joseph Jekyll* and Sir *Jeffery Gilbert*, two of the then Lords Commissioners for the custody of the Great Seal; who were pleased to over-rule the appellant's exceptions, and to declare, that the whole paternal estate of *Robert Wynn*, which descended to him from his ancestors the *Wynns*, did pass by the words in the will, of all his estate of *Maesmochnant*; and therefore decreed, that the appellant's bill should stand dismissed, without costs; and that the Master should deliver back the will and deeds produced before him, to the respondent.

P. Yorke.

W. Peere
Williams.

From this decree and report the present appeal was brought; and on behalf of the appellant it was argued, that the death of his father *Owen*, in the life-time of *Robert*, who suffered the recovery and made the will, ought not to prevent the appellant from taking the premises in question, as heir of the body of his

his father *Owen*, who was the next remainder-man in tail, expectant upon the death of *Robert* and his brother *Maurice*, without issue; because it appeared to have been the intention of *Robert Wynn*, as well by the will as by the deed, that the premises should come to the appellant's father, and the heirs male of his body, in default of issue of the said *Robert* and his brother *Maurice*: And the remainder in fee limited by the will to the testator's own right heirs, was to take place only in case of failure of heirs of the body of his cousin *Owen Wynn*, the appellant's father, which had not yet happened. That if this were so, the uses declared of the recovery ought, in the meantime, to be let in; and the appellant, as heir of the body of *Owen*, ought to take thereby, in the same manner as if no other appointment or disposition had been made by *Robert Wynn* of the premises. That if the death of *Owen*, in the life-time of the testator *Robert*, should prevent the appellant from taking any part of the premises devised by the will; yet that devise extended only to the capital messuage and demesnes of *Maesmochnant*, and not to any other of the testator's lands in the county of *Denbigh*; for they were known by different names, rated and taxed separately as distinct tenements, lay in different parishes, and were purchased; or came into the family by marriage, at several times, and some of them were purchased by the testator himself. That in case all the paternal estate of *Robert Wynn*, passed by the devise in the will, of all his estate of *Maesmochnant*; yet it was conceived, that the appellant's bill ought not to have been absolutely dismissed, nor the deed of the 12th of *September*, 1709, decreed to be delivered back to the respondent; because there were general words in that deed, which comprised the lands purchased by *Robert Wynn*, as well as the paternal estate: For *Robert Wynn* not only recites, that he had suffered a common recovery of all his lands, tenements and hereditaments in the said county; but, by the same deed declared, that all and every person and persons, who then were, or should, by virtue of the recovery therein recited, or otherwise, be seised of the premises therein mentioned, should stand seised thereof, to the uses expressed in the said deed; by which the appellant, as the only son and heir of his father *Owen Wynn*, became entitled to the same, as the next remainder-man in tail, after the death of *Maurice* the brother, without issue, and ought to have had the deed delivered up, to enable him to assert his

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title as he could by law, to the purchased premises, under that deed; especially since the Master's report, and the decree grounded thereon, related only to the paternal estate; whereas the title to the purchased estate remained still undetermined, and the respondent had not, nor could pretend to any title or interest whatsoever thereto, by or under the said deed.

T Lutwyche.

C. Talbot.

To this it was answered on the other side, that the will absolutely superseded the uses of the deed; and that by the death of *Owen Wynn*, the appellant's father, in the life-time of *Robert*, the testator, the devise to *Owen* and the heirs male of his body became void; the appellant could therefore derive no title by law to that devise, as heir of the body of *Owen Wynn*, who never took any estate by virtue of the devise. That the whole paternal estate of *Robert Wynn*, was known by the general name of *Maesmochnant* estate; and so it appeared by the appellant's own witnesses, and he by his bill claimed it by the very same name. The whole value of which estate was but 120*l.* *per ann.* and he by his will, had charged it with an annuity of 100*l.* *per ann.* tax-free, besides his debts, legacies and funeral expences; which the capital messuage and demesnes alone, would not be near sufficient to pay. That the appellant could have no pretence to the purchased estate, as *Robert Wynn* was seised thereof in fee-simple; besides, he claimed by his bill no other than the estate tail, of which the recovery was suffered; nor could it be imagined, that *Robert* would be at the expence of suffering a recovery of lands whereof he was seised in fee-simple. That tho' there might be general words in the deed, yet the same being executed after suffering the recovery, and designed to lead the uses thereof, it could extend to no other or greater estate, than what was strictly comprehended in the recovery; nor could the covenant to stand seised, go any further than to the lands in the recovery. And that no more than the old estate was contained in the recovery, was very evident by comparing the last recovery with the old conveyances of the family, and with fines levied above an hundred years ago; from whence it would appear, that there was not a single acre of land comprised in the last recovery, more than there was in those ancient fines; nor could the deed declaring the uses of the recovery, pass more lands than were comprised in the recovery itself. That the appellant ought not to perplex the respondent at law, after he had chosen to proceed in the manner prescribed

prescribed by the first decree; and after the matters in dispute had been fully heard and determined against him in that Court, where he himself had submitted they should be determined: And therefore it was hoped, that the decree and report would be affirmed, and the appeal dismissed with costs; especially, as the respondent had no costs below, tho' he was the testator's heir at law.

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ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and that the several orders, report and decree therein complained of, should be affirmed.

DECREE affirmed. Jour. vol. 22. p. 615.

John Prowse, Gent.

Plaintiff

Case 22.

Samuel Foot, Esq;

Defendant

in Error.

11th March, 1725.

IN Michaelmas term, 1720, the defendant commenced his action against the plaintiff, complaining of a false return made by the plaintiff to a writ of *Mandamus*, which issued out of the Court of King's Bench; and declared, that the borough of *Truro* in the county of *Cornwall*, by letters patent dated the 20th of June, 31st Eliz. was incorporated by the name of Mayor and Burgesses of the Borough of *Truro* in the county of *Cornwall*; and that the said Queen, by the letters patent, appointed twenty-four of the most discreet inhabitants, to be assisting to the Mayor, and four of the said twenty-four, called capital Burgesses, to be Aldermen; that the Mayor and capital Burgesses should have a council-house; that the Mayor and capital Burgesses, and Common Council, or major part of them, yearly on the 9th day of October, should name one of the Aldermen to be Mayor for the year ensuing, who was to hold the office for a year, and until another was chosen into his place; and that the defendant being an Alderman of the said borough, was on the 9th of October, 1720, duly elected and sworn Mayor of the said borough. — The declaration further stated, that the

Viner, vol. 6. p. 297. ca. 9.

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the plaintiff being a capital burghers, and formerly Mayor of the borough, had in his custody the *Regalia* belonging to the borough, which the defendant requested him to deliver, but he refused; that thereupon the defendant in *Michaelmas* term, *Anno 7^o Georgii Regis*, brought his writ of *Mandamus*, directed to the plaintiff; which writ (suggesting that the defendant was duly elected and sworn Mayor, and thereby entitled to the *Regalia* of the borough, for the use and benefit of the said borough) commanded the plaintiff to deliver the *Regalia* to the said defendant for the use and benefit of the said borough, or shew cause to the contrary the then next *Hilary* term: — And that to this writ of *Mandamus*, the plaintiff falsely returned, that the defendant was not duly elected, nor duly sworn into the office of Mayor of the said borough, &c.

To this declaration, *Prowse* pleaded not guilty; and issue being joined, the Court of King's Bench directed a trial at bar: Accordingly the cause came on to be tried in *Trinity* term following, and upon the trial, *Foot* gave in evidence the letters patent of the 20th of *June*, 31 *Eliz.*

By these letters patent, the Queen, after reciting that the Burghesses and inhabitants of the said borough of *Truro* had, time out of mind, several franchises, liberties and privileges, as well by prescription as by divers charters and grants, incorporated the said borough by the name of Mayor and Burghesses of the said borough of *Truro* in the county of *Cornwall*; and thereby appointed that there should be twenty-four of the most discreet inhabitants, who should be always aiding and assisting to the Mayor, in all matters and causes relating to the good government of the borough; and that the Mayor and Common Council, or major part of them, (of whom the Mayor and two Aldermen were always to be three) should have power to make bye-laws and statutes, for the good government of the said borough, as should seem most convenient to them; and likewise appointed four of the twenty-four Burghesses, who should be called Aldermen. — The Queen also appointed the Mayor and Burghesses to choose a Recorder, to continue *quam diu se bene gesserit*, and to act by himself, or his sufficient Deputy: And that the Mayor, Burghesses and Common Council, or major part for the time being, should elect two Members to Parliament: And appointed *Thomas Burges* to be the first Mayor, to
continue

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continue from the date of the said letters patent, until the 9th of *October* following, and until another Burgeſs ſhould be elected and ſworn Mayor, according to the order and provision for electing a Mayor, mentioned in the ſaid letters patent, if he the ſaid *Thomas Burgeſs* ſhould ſo long live; and appointed him the ſaid *Thomas Burgeſs* Mayor for the time aforeſaid; and further appointed *Henry Rawe* and twenty-three other Burgeſſes, to be the firſt capital Burgeſſes, and to continue ſo *quam diu ſe bene geſſerit*; and appointed *Robert Tonkreke* to be the firſt Recorder. The charter likewiſe appointed *Henry Rawe*, *William Hugbnam*, *John Roſega* and *John Roberts*, four capital burgeſſes and inhabitants, to be the four firſt Aldermen, to continue from the date of the ſaid letters patent, to the 9th of *October* following, and until other Burgeſſes ſhould be elected and ſworn, according to the order and provision for electing a Mayor, in the ſaid letters patent mentioned; if they, or any of them, ſhould ſo long live, and appointed them Aldermen for the time aforeſaid; which ſaid Aldermen were to be always aiding and aſſiſting to the Mayor, in all cauſes and matters relating to the ſaid borough, and the good government thereof; and two of them at leaſt to be preſent at all aſſemblies, to vote for the election of the Mayor and other officers.

— Theſe letters patent further granted to the Mayor and Burgeſſes and their ſucceſſors, that the Mayor and capital Burgeſſes and Common Council for the time being, or the major part of them, ſhould have power for ever after, yearly, on the 9th of *October*, to chuſe one of the Aldermen to be Mayor; who being ſworn, ſhould bear the office of Mayor for one year then next following, and until another ſhould be choſen in his place; and that the Mayor ſo elected, ſhould be ſworn before the laſt Mayor his predeceſſor, if living and preſent, and if dead or abſent, then before the Recorder and the reſt of the Aldermen and Burgeſſes preſent, and ſo as often as it happened; and that if the Mayor ſhould die, or be removed during his mayoralty, the Common Council for the time being, or the major part of them, ſhould meet in the Guildhall, or other convenient place in the ſaid borough, within twelve days after notice of the death or removal of ſuch Mayor, and chuſe one of the four Aldermen, before the capital Burgeſſes then preſent, to be Mayor in his place; and ſuch perſon to be ſworn before

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the Recorder, and the rest of the Aldermen and capital Burgesſes then preſent.

Mr. *Foot* at this trial farther gave in evidence, that upon the 12th of *November*, 1719, *Henry Vincent* junior, then Mayor of the ſaid borough, and who had been Mayor for ſeveral years, died; and thereupon, within twelve days after the death of the ſaid *Henry Vincent*, viz. the 19th of the ſaid month of *November*, 1719, the Common Council, (of whom the aforeſaid *Samuel Foot* and *Samuel Ennys* were two, who had been elected and ſworn Aldermen of the ſaid borough about five years next before, and had from thence always acted under ſuch election and ſwearing, as Aldermen to that time, and then claimed to be Aldermen, were preſent and aſſenting) being duly aſſembled, did name and elect the ſaid *Samuel Foot* to be Mayor, in the place of the ſaid *Henry Vincent*, to hold to the 9th of *October* then next following, and until another ſhould be elected and ſworn in his place: That the ſaid *Samuel Foot* afterwards, viz. the 13th of *December* following, was ſworn before the Recorder and capital Burgeſſes, and the ſaid *Samuel Foot* and *Samuel Ennys*, ſo claiming to be Aldermen, then preſent, according to the ſaid letters patent. — That upon the 9th of *October*, 1720, the ſaid *Samuel Foot*, Mayor as aforeſaid, and the ſaid capital Burgeſſes and Common Council, (of whom the ſaid *Samuel Ennys* and *Richard Plint* were two, and which ſaid *Richard Plint* had, ſome years before, been elected Alderman, and was then in that aſſembly, ſworn before the ſaid *Samuel Foot* into the office of Alderman) duly aſſembled themſelves in the Guildhall of the ſaid borough, to elect one of the Aldermen for Mayor for the year enſuing; and the ſaid *Samuel Foot*, Mayor as aforeſaid, and the capital Burgeſſes and Common Council being ſo aſſembled (the ſaid *Samuel Ennys* and *Richard Plint* ſo as aforeſaid, being Aldermen, and preſent and aſſenting) elected the ſaid *Samuel Foot* to be Mayor of the ſaid borough for the year enſuing; and the ſaid *Samuel Foot*, on the 21ſt of *November* following, was ſworn before the ſaid *Samuel Ennys*, then Deputy Recorder, and the capital burgeſſes; and the ſaid *Samuel Ennys* and *Richard Plint*, ſo being Aldermen as aforeſaid, were then preſent. — *Foot* alſo proved the writ of *Mandamus*, and the return made by the defendant *Prowſe* as ſtated in the declaration; and further, that he the ſaid *Samuel Foot* was elected and ſworn Alderman, on the 9th of *October*, 1714, and that no other

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persons had been elected or sworn, in the places of any of the said Aldermen, at the end of their respective years; but that they the said *Samuel Foot* and *Samuel Ennys*, had continued ever since their said first elections to be Aldermen, to act in the offices of Aldermen by virtue of such their elections: That *Richard Plint* on the 9th of *October*, 1713, was elected Alderman of the said borough, and afterwards sworn into the office of Alderman, before Mr. *Foot* who claimed to be Mayor as aforesaid, in the said Common Council assembled on the 9th of *October*, 1720; and that the swearing of the said *Richard Plint* into the said office of Alderman, on the 9th of *October*, 1720, was before the election of the said *Samuel Foot*, on that day, into the office of Mayor; that the said *Plint* claimed to be an Alderman by virtue of such his election, and that no other person had been elected Alderman in the place of the said *Richard Plint*.

In opposition to the evidence thus given on the part of *Foot*, the defendant *Prowse's* counsel objected and insisted, that neither *Foot*, *Ennys*, or *Richard Plint*, were Aldermen at the several nominations of the said *Samuel Foot* to be Mayor of the said borough; and that there were not two Aldermen present, at the several nominations of the said *Samuel Foot* to be Mayor; because there had not been any annual elections of Aldermen, as they insisted by the said letters patent ought to be: Yet the plaintiff *Foot's* counsel insisted, that there were two good Aldermen present at the several nominations of the said *Samuel Foot* to be Mayor, according to the said letters patent: But the Court of King's Bench were of a different opinion, and declared to the jury, that the said *Samuel Foot*, *Samuel Ennys* and *Richard Plint*, were not and did not continue Aldermen, at the said several nominations of *Samuel Foot* to be Mayor; and that there were not two Aldermen present at the nominations of the said *Samuel Foot* to be Mayor, according to the said letters patent, as there ought to have been; and for that reason, the several nominations of the said *Samuel Foot* to be Mayor of the said borough were void; and therefore directed the jury to find a verdict for the defendant *Prowse*, which was done accordingly. But the council for *Foot* praying a bill of exceptions, which the Judges allowed; judgment was given for the defendant *Prowse*.

Whereupon

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Whereupon the plaintiff *Foot* brought his writ of error in the Exchequer Chamber; and after two solemn arguments, the judgment given in the Court of King's Bench was, by the unanimous opinion of the Judges, reversed.

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T. Hufsey.

The defendant *Prowse* thereupon brought his writ of error in Parliament; and on his behalf it was insisted, that the words of the charter were plain, that two Aldermen should be elected yearly; that the electors by the charter, had power only to elect a person being an Alderman to be Mayor, and that there must be at least two of the Aldermen present at every election; and therefore it was conceived, that the defendant *Foot* was not an Alderman at either of his pretended elections, and consequently not capable of being chosen Mayor. That neither *Ennys* or *Plint* were Aldermen at the time of the elections, they, as well as *Foot*, having been chosen Aldermen several years before, and never re-elected; and *Plint* not having been sworn till seven years after his election. That if the first election of Mr. *Foot* could possibly be supposed good, yet he having, in his declaration, insisted upon an election on the 9th of *October*, 1720, being the charter-day, and which election was clearly ill; he should not be allowed to resort back to another election, not insisted upon in his declaration, to which Mr. *Prowse*, for that reason, could not be supposed to have any opportunity of giving an answer. It was therefore hoped, that the judgment of the Exchequer Chamber would be reversed; and the judgment of the Court of King's Bench affirmed.

T. Lutwyche.

C. Talbot.

On the other side it was said, that the only question in this case was, Whether upon the clauses of the charter, and the facts before stated, it did not appear, that *Samuel Foot* was duly elected Mayor of the borough of *Truro*? That it appeared by the record, that two Aldermen were present at the election of *Foot* to be Mayor, who was himself also a good Alderman, notwithstanding the said Aldermen were elected some years before; for though there was a power given by the charter to elect Aldermen annually, yet it was insisted, that this clause was only directory in that respect; and that the office of Alderman was not, by virtue of that clause, to determine at the end of the year after his election; but that the person who was legally elected and sworn into the office, continued until another was chosen in his room, or until his death or removal, in the same manner.

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manner as a person elected into the office of Mayor. That the clause in the charter, appointing and naming the first four Aldermen, had a reference to the clause for electing the Mayor, as well with respect to the time and manner of electing Aldermen, as their continuance in office; and as it appeared, that no other person had been chosen into the office of Alderman in the room of *Foot*, *Ennys*, or *Plint*, they ought more especially to be esteemed good and sufficient Aldermen. The opinion therefore of the Court of King's Bench, that there were not two Aldermen present at Mr. *Foot*'s election to be Mayor, that *Foot* himself was not a good Alderman, and that his election into the office of Mayor was void; and the verdict given thereupon, and the judgment founded on that verdict, were apprehended to be erroneous; and that *Foot* having good reason to bring a writ of error, the judgment of the King's Bench was rightly reversed, and that judgment of reversal ought to be affirmed.

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ACCORDINGLY, after hearing counsel on this writ of error, it was ORDERED and ADJUDGED, that the judgment given in the Exchequer Chamber should be affirmed; and that the record should be remitted, to the end execution might be had thereupon, as if no such writ of error had been brought into the House: And it was further ORDERED, that the plaintiff should pay, or cause to be paid to the defendant, the sum of 50*l.* for his costs sustained by reason of bringing the said writ of error.

JUDGMENT
affirmed.
Jour. vol. 22.
p. 622.

Peter Pender, Gent,	-	Plaintiff	}	in Error.	Case 23.
Our Sovereign Lord the King,		Defendant	}		

18th March, 1725.

KING James II. by his letters patent, dated *decimo septimo Martii, anno regni suo primo*, did grant and declare, that the borough of *Penryn*, in the county of *Cornwall*, should be and remain for ever, a free borough; and that the Burgeses and inhabitants of the said borough and their successors, should be a body corporate and politic, by the name of the Mayor and

Viner, vol. 6.
p. 297. ca. 10.

Burgesses of the borough of *Penryn* in the county of *Cornwall*, and by the same name should have perpetual succession; and that there should be in the said borough, one of the more discreet Burgesses, who should be Mayor of the said borough; and that there should be in the said borough, twenty-four capital Burgesses, who should be aiding and assisting to the Mayor for the time being, in all matters concerning the said borough and the government thereof. And the said King, by his said letters patent, appointed and created *James Kemp*, to be the first Mayor of the said borough, to continue in the said office of Mayor from the date of the said letters patent, unto the feast of *St. Matthew* the Apostle, then next following; and from thence until another of the said borough should be elected, appointed and sworn into the said office. He also appointed *Richard Arundle*, Baron of *Frerise*, and twenty-three other persons therein named, to be the first capital Burgesses of the said borough; to continue in their offices during their natural lives, unless they, or any of them, by the Mayor and capital Burgesses of the said borough for the time being, or the major part of them, should be amoved for mal-administration, or other reasonable cause: And that as well the said *James Kemp*, as every other Mayor of the said borough, should, after his mayoralty expired, be a capital Burgess, to continue in the said office for his life; unless he should be amoved for reasonable cause as aforesaid: And the said King, by his said letters patent, did farther will and grant, that the Mayor of the said borough for the time being, or his Deputy, and the capital Burgesses of the said borough for the time being, or so many of them as should be then present, or the major part of them, every year, upon the feast of *St. Matthew* the Apostle; and that the capital Burgesses of the said borough, or so many of them as should be then present, or the major part of them, whensoever the Mayor of the said borough for the time being, should happen to die within his year, or be amoved or depart from his office, should have power and authority to choose one of the capital Burgesses of the said borough, to be Mayor of the said borough until the next feast of *St. Matthew* the Apostle; and from thence until another Mayor should be elected, appointed and sworn: And if at such election the number of voices should be equal, the Mayor or his Deputy, and if the Mayor was dead or amoved, then the senior capital Burgess then present, should have a double voice: And that he (the said Mayor) after he should be so

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electd as aforesaid, and before he should be admitted to execute his office, should take a corporal oath before the last Mayor his predecessor, or his deputy, well and faithfully to execute the said office; and which oath the said last Mayor had authority thereby given him to administer.

On the feast of *St. Matthew* the Apostle, viz. the 21st of September, 1722, one *Joseph Penballow*, a capital Burgefs, was duly elected, appointed and sworn Mayor of the said borough of *Penryn*, but died within the year of his mayoralty, viz. on the 15th of *March* next after his election; and upon the 10th of *May* following, the plaintiff, also a capital Burgefs, was elected Mayor of the said borough during the residue of that year, and from thence until another of the said capital Burgeffes should be duly elected, appointed and sworn into the said office, according to the said letters patent.

The plaintiff neither upon, or at any time after his election, took the oath directed by the letters patent, well and faithfully to execute his office; nor was he ever sworn and admitted into the said office of Mayor, according to the said letters patent; and yet, notwithstanding such default, he upon the same 10th of *May* did take upon him and execute the office of Mayor of the said borough; and from thence unto the 23d of *January*, 1723, did, by usurpation upon the Crown, continue to use and exercise the said office, contrary to the tenor of the said letters patent; and did claim to be Mayor of the said borough, and to have, use and enjoy all liberties, privileges and franchises belonging or appertaining to the office of Mayor.

Therefore to amove the plaintiff from the said office, and to punish him for such usurpation, an information, in the nature of a *quo warranto*, was, in *Hilary* term, 1723, exhibited against him, at the relation of *Henry Cruwys*, Gent. by the King's Coroner and Attorney in the Court of King's Bench at *Westminster*, to shew by what authority he claimed to be Mayor of the said borough, and to execute such office.

To this information, the plaintiff appeared and pleaded; and by his plea admitted the letters patent, and the election and swearing of *Joseph Penballow*, Mayor of the said borough, and also his death. — But he further by his plea said, that upon the said

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saïd 10th of *May*, the office of Mayor being then vacant, and he being a capital Burgeſs of the ſaïd borough, was, by the major part of the capital Burgeſſes, elected and appointed Mayor of the ſaïd borough, during the reſidue of the ſaïd year, and from thence, until another Mayor ſhould be elected and ſworn; and that after ſuch his election, he did, on the ſame day, duly and according to the form and effect of the ſaïd letters patent, take a corporal oath, well and faithfully to execute the ſaïd office, and was then admitted into the ſaïd office of Mayor of the ſaïd borough; and therefore prayed, that the ſaïd office, liberties, privileges and franchises might be adjudged and allowed unto him.—To which plea a replication was put in by the King's Coroner and Attorney, and it was thereby traversed and denied, that the plaintiff was elected and appointed Mayor of the ſaïd borough, as he had alledged in his plea.—And it was thereby alſo traversed and denied, that he did take a corporal oath, well and faithfully to execute the ſaïd office, or was admitted into the office of Mayor of the ſaïd borough, *modo & forma*, as he had alſo alledged in his ſaïd plea.

Whereupon ſeveral iſſues being joined, the ſame were tried at the *Lent* Aſſizes held in *Cornwall*, 1723, before Sir *Robert Raymond*, Lord Chief Juſtice of the Court of King's Bench:—And after a full evidence and hearing, the jury gave their verdict on the firſt iſſue, that the ſaïd *Peter Pender* was elected and appointed Mayor of the ſaïd borough, as he had alledged in his plea.—But on the ſecond iſſue, they found that the ſaïd *Peter Pender* did not take a corporal oath, well and faithfully to execute the ſaïd office; and that he was not admitted into the office of Mayor of the ſaïd borough, as he had by his ſaïd plea alledged.

In conſequence of this verdict, the Court of King's Bench, in *Eaſter* term following, awarded judgment of ouſter againſt him in the following words, *viz.* “*Quod predictus Petrus Pender de & in officio libertat' privileg' & franches' predictis nullo modo ſe intromittat, ſed ab eiſdem & eorum quolibet penitus abjudicetur. & excludatur, &c. Et quod predictus Petrus Pender ad ſatisfaciendum Domino Regi de uſurpatione prædicta capiatur, &c. Et quod prædictus Henricus Cruwys, relator ſupra nominatus in hac parte recuperet verſus præſatum Petrum Pender octoginta libras pro cuſtagiis ſuis in & circa*“
“*ſectam*”

“ *sectam suam in hac parte erogatis & expensis secundam for-*
 “ *mam statuti in hujusmodi casu edict' & provis.*”

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To reverse this judgment, a writ of error was brought in Parliament; and, on behalf of the plaintiff in error it was insisted, that the judgment was erroneous, especially in that part of it, which excluded him from the office; for it appeared upon the record, that his right to the office was established by the verdict of the jury, which found that he was duly elected; and yet whilst this judgment of ouster stood, the plaintiff could not have the effect of a *mandamus* from the King's Bench, to be sworn into that office, tho' the legality of his election was not disputed; and tho' no time was limited by the charter for his being sworn, nor was he by law debarred from having such *mandamus*, tho' he acted before he was sworn.

T Lutwyche.

T. Hufley.

On the other side it was argued, that by the statute 9 Ann. c. 20. it is expressly enacted, “ That from and after the first day of *Trinity* term, 1711, in case any person or persons shall usurp, intrude into, or unlawfully hold and execute any of the offices or franchises of Mayor, Bailiff, &c. therein mentioned; it shall and may be lawful for the proper officer of the Court of King's Bench, with leave of the said Court, to exhibit one or more information or informations, in the nature of a *quo warranto*, at the relation of any person or persons, desirous to sue or prosecute the same, against such person or persons so usurping, intruding into, or unlawfully holding and executing any of the said offices and franchises.—And it is declared, that in case any such person or persons, against whom any information or informations, in the nature of a *quo warranto*, shall, in any of the said cases, be exhibited, shall be found or adjudged guilty of any usurpation or intrusion into, or unlawfully holding or executing any of the said offices and franchises; it shall and may be lawful to and for the said Court, as well to give judgment of ouster against such person or persons, of and from the said offices and franchises, as to fine such person or persons respectively, for his or their usurping, intruding into, or unlawfully holding and executing any of the said offices and franchises: And also, it shall and may be lawful to and for the said Court to give judgment, that the relator in such information named, shall recover his costs of such prosecution, to be levied in the

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"manner therein before directed."—That it being expressly required by the letters patent of incorporation, that the person elected to be Mayor, should take the oath of office before he should be admitted to execute such office; it became necessary for the plaintiff, in order to make his justification complete, to alledge that he did accordingly take such oath; and this allegation having been falsified by the verdict of the jury, the justification being entire, was destroyed, and he was found to be an usurper of the office, and consequently subject to the judgment of ouster, as being the only legal judgment in this case. It was therefore prayed, that the judgment of the Court of King's Bench might be affirmed with costs.

JUDGMENT
affirmed.
Jour. vol. 22.
p. 624.

ACCORDINGLY, after hearing counsel on this writ of error, it was ORDERED and ADJUDGED, that the judgment given in the Court of King's Bench should be affirmed; and that the record should be remitted, to the end such proceeding might be had thereupon, as if no such writ of error had been brought into the House. And it being proposed, that the plaintiff should be ordered to pay costs to the defendant, by reason of the bringing the said writ of error; it was ORDERED, that the consideration of costs should be reserved till the next *Tuesday*; at which time, the parties on either side were at liberty to be heard, by one counsel of a side, touching the matter of costs only, and that all the Judges in town should then attend.

— p. 626.

This matter accordingly came on at the time appointed, being *Tuesday* the 22d of *March*, 1725; when one counsel of a side being heard, the two Lord Chief Justices delivered it as their opinion, "that costs did not lie in this case."

Case 24. *Peter Pender*, Gent.

Plaintiff

John Herle, Esq;

Defendant

} in Error.

22d *March*, 1725.

AFTER the judgment of ouster in the preceding case was given, Mr. *Pender*, without any other election, moved for and obtained a writ of *mandamus* from the Court of King's Bench,

Bench, directed to the present defendant, as being the last Mayor of the borough of *Penryn*, before the election of *Penballow*, commanding him to administer to the said *Peter Pender* the oath for the faithful execution of the said office of mayor, and the other oaths in such cases used, and also to admit and swear him into the said office, or shew cause to the contrary.

Whereupon the defendant, in his return to this writ, set forth the letters patent, information, pleadings, trial, verdict and judgment already stated; and he further certified and averred, that the election of the said *Peter Pender* into the office of Mayor, in this return mentioned, and in his plea to the said information also mentioned, were one and the same election; that the said *Peter Pender*, at any time before or after the said election, had not been elected into the said place or office of Mayor of the said borough of *Penryn*, in the said writ mentioned; and that therefore, he the said defendant could not, nor ought to administer to the said *Peter Pender*, the oath for the execution of the said office of Mayor, and the other oaths aforesaid, or to admit and swear him into the said office.

The matter of this return coming to be argued in the said Court of King's Bench in *Easter* term, 1725, the Court were unanimously of opinion, that the return was good and sufficient in law; and therefore allowed the same, and refused to grant a peremptory *mandamus*.

Whereupon *Pender* brought his writ of error in Parliament; insisting, that this judgment was erroneous, and ought to be reversed; in regard it appeared, both by the verdict of the jury, and by the return itself, that he was rightfully elected into the said office of Mayor; and that no other person had been elected or sworn into that office since, nor could be, unless he was sworn and admitted, in pursuance of such his election.

On the other side it was, in the first place, submitted, whether any writ of error lay in the present case; which was merely an award of the Court, and not a strict formal judgment. But if such writ of error did properly lie, it was contended, that the allowance of the return was just, and according to the rules of law; for that after the judgment of ouster was regularly given against *Pender*, his whole right under that election was extinguished, in consequence of his own misbehaviour and usurp-

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usurpation, in acting without being sworn; and he being totally forejudged of all claim under such election, could not have any right to the said office of Mayor, or ever intermeddle therein, unless upon a new election, subsequent to the said judgment. It was therefore prayed, that this writ of error might be quashed, or that the proceedings in the Court of King's Bench might be affirmed with costs.

Writ of Error quashed.
Jour. vol. 22.
p. 625, 627.

Vide vol. II.
p. 554. et
seq.

AFTER hearing counsel on this writ of error, and reading a judgment of the House, dated the 21st of *April*, 1724, in the following words, *viz.* "After hearing counsel to argue the errors assigned upon a writ of error between the Dean and Chapter of *Dublin*, plaintiffs, and the King, defendant; wherein the unanimous opinion of all the Judges then present is mentioned, *viz.* that no writ of error will lie upon the award of a peremptory *mandamus*:" It was ORDERED and ADJUDGED, that this writ of error being brought upon proceedings at common law only, on a writ of *mandamus*, should be quashed.

Case 25. Sir John Rous, Bart. - - - Appellant.

John Barker, John Howse and Lucy his
Wife, *Charles Ward*, Clerk, *William*
Powell and Mary his Wife, John Rus- } Respondents.
sel, John Mayhew and Robert Bence, }

23d March, 1725.

IN the manor of *Bedfield* in *Suffolk*, whereof the appellant was seised in fee, there were several freehold and copyhold tenements intermixed, out of which several free rents and quit rents were yearly payable to the Lord of the manor for the time being; and in this manor there is an immemorial custom, that upon the death, or alienation of every copyhold tenant, a fine, according to the yearly value of the copyhold lands and tenements, is always paid and payable to, and at the will of the Lord, besides the quit rents and services in arrear.

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James Maybew, the respondent *John Maybew's* father, being seised of several freehold lands within the manor, and also of several pieces of copyhold land holden of the same, the copyhold lands containing in the whole fifteen acres and three roods, and lying intermixed with, and by a long unity of possession, not to be distinguished from the freehold lands; he, on the 14th of *October*, 1703, surrendered into the hands of the appellant, as Lord of the said manor, to the use of *John Barker* and his heirs, six pieces of land, containing fifteen acres and three roods, part of the said copyhold lands, described by the antient names following, viz. "one acre of land, called *Freebornes* ; " three roods, called *Gelyans* ; two pieces, containing two acres, " lying in a close called *Gelyans* ; one other piece, in the same " close, containing one acre ; one other piece, containing seven " acres ; and one other piece, called *Sbraggs*, containing four " acres ;" subject to a proviso or condition, to be void on payment of 147*l.* upon the 14th of *October* then next. And default being made in payment of this sum, according to the condition, the said *John Barker* was admitted tenant to the premises, at a general court holden for the said manor on the 17th of *January*, 1704 ; upon which admission, he paid a fine to the appellant, as Lord of the manor.

The said *James Maybew* having, about the time of the surrender, mortgaged the remaining part of his estate within the manor to the said *John Barker*, and to the respondents *John Howse* and *Lucy* his wife, *Charles Ward*, *William Powell* and *Mary* his wife, *John Russell* and *Robert Bence*, or those under whom they claimed ; the mortgagees, some time afterwards, entered upon all the freehold and copyhold estates belonging to the said *James Maybew* within the said manor, and depending upon the impossibility of distinguishing the copyhold from the freehold, they refused to satisfy the appellant for the fines and quit-rents due for the copyhold lands.

In 1714, the said *John Barker* died, leaving *James Barker* his son and heir, who was admitted to the tenement and four acres called *Sbraggs* ; but refused to be admitted to any other part of the lands to which his father was admitted, and died in some short time after, without being admitted to any other of the said lands : Whereupon, the death of the said *James Barker* being presented by the homage, three proclamations

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were made, according to the custom, at three general courts holden for the said manor, and no person coming in to be admitted to the said copyhold lands, the Steward awarded a seizure, and directed a warrant to the Bailiff of the manor, to seize into the hands of the appellant, such of the said copyhold lands as the said *John Barker* was admitted to, and to which the said *James Barker* refused to be admitted; but the Bailiff not being able to distinguish, or find out the antient abuttals, no seizure could be made; whereupon, in order to make out the antient land-marks and boundaries, the appellant, together with the Steward and several antient copyholders of the manor, did, with the greatest care and diligence, upon view of all the estates of the said *James Mayhew* within the manor, and by inspection of the manor books, endeavour to find out the boundaries, but to no purpose; the abuttals and boundaries described in the manor books, being either destroyed, or so changed and altered, that they could not be discovered.

James Barker leaving the respondent *John Barker* his son and heir, he also refused to be admitted to any part of the copyhold lands, formerly the estate of *James Mayhew*, to which *John Barker* his grandfather was admitted, except the said tenement and four acres called *Shraggs*; unless the appellant would set out and ascertain the metes and boundaries thereof, which was not in his power to do.

The said *James Mayhew* being dead, leaving the respondent *John Mayhew* his son and heir, who, as such, became entitled to the equity of redemption of the mortgaged premises; the appellant, in *Michaelmas* term, 1720, exhibited his bill in the Court of Exchequer against all the respondents; praying a discovery of their deeds and writings, and that a commission might be awarded, to set out, ascertain and describe the copyhold lands, late of the said *James Mayhew*.

To this bill the respondents put in their several answers; and thereby admitted, that sixteen acres, part of the estate of *Mayhew*, were in the possession of the respondent *Barker*; twenty four acres, other part thereof, in the possession of the respondents *Howse* and his wife, or of *Charles Ward* and *Robert Bence*, as their trustees; that twenty four acres, other part thereof, were in the possession of the respondents *Powell* and his

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his wife; and that the respondent *Russell* was in possession of a tenement and ten acres of land, other part thereof, under several mortgages made by the said *James Mayhew*.—The respondent *Barker*, by his answer said he did not know, whether a close called *Sbraggs*, containing about seven acres, part of the said sixteen acres admitted to be in his possession, was freehold or copyhold; but said, he was entitled to fifteen acres and three roods of copyhold land, by virtue of the surrender made by *Mayhew* to *John Barker*, his grandfather; and insisted, that the appellant ought to set out and allot the particular copyhold lands to him, before he was obliged to be admitted and pay his fine.—And the respondent *Mayhew* insisted, that he was heir at law of his said father *James Mayhew*, and as such, entitled to the equity of redemption of the said copyhold lands.

The cause being at issue, witnesses were examined on both sides, and publication being duly passed, the same was heard on the 25th of *June*, 1725, before the Lord Chief Baron *Gilbert*, Mr. Baron *Price* and Mr. Baron *Page*; when the Court was pleased to order and decree, that it should be referred to a trial at law, to be had at the next Assizes to be held for the county of *Suffolk*, upon the following issue; *viz.* whether any and what copyhold lands were in the possession of the respondent *John Barker*, besides *Sbraggs*; and whether any and what copyhold lands were in the possession of the respondent *Russell*; and it was further ordered, that the respondent *John Mayhew* might be a defendant in the said trial at law, if he should think fit: And that the appellant's bill, as to the other respondents, should be dismissed with costs.

From this decree the appellant appealed, and on his behalf it was insisted, that the directing such an issue was giving him no proper relief; he having by the proofs in the cause sufficiently ascertained, that *James Mayhew* and his ancestors, were successively admitted to the said fifteen acres and three roods of copyhold land; but by reason of the confusion in the boundaries, he could not make legal proof of the particular abuttals thereof; and which ought therefore to be set out as near as might be, by Commissioners appointed by the Court, upon an inspection of the deeds and writings relating thereto, and by comparing the descriptions therein contained, with the lands in the possession

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sion of the several respondents, and by other enquiries proper for such Commissioners to make; but should the appellant be referred to an issue at law for that purpose, he must, for the above reason, be wholly destitute of relief in the premisses. That the appellant's bill ought not to have been dismissed, as to the respondents *Howse* and wife, *Ward*, *Powell* and wife, and *Bence*, or any of them; for it appearing that *James Maybew* was admitted to and in possession of fifteen acres and three roods of copyhold land, and that all his freehold and copyhold lands were in the actual possession of those respondents, and of the other respondents *Barker* and *Russell*; the Court ought to have granted a commission to separate the copyhold from the freehold, and to distinguish the metes and bounds of the copyhold; and if the exact boundaries could not be found, then to set out so much of the freehold in lieu of the copyhold, as might be an equivalent; and all parties should have been directed to produce their deeds and writings, in order to find out the truth; and the rather, for that in this case it ought to be presumed, that at least fifteen acres and three roods of the lands formerly in *Maybew's* possession were copyhold and not freehold; and to put it upon those deriving under him, to shew that they were ancient freehold. Lastly, that refusing the appellant a commission, was a precedent of dangerous consequence, and affected the Lords of all the manors in *England*; in as much, as where the boundaries of copyhold lands were so ancient or obscure, as not to be without great difficulty ascertained, the Lords of manors would, in many cases, inevitably lose their inheritance.

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T. Browne.

On the part of the respondent *Barker* it was contended, that neither he, or any of his ancestors, or their tenants, appeared to have been ever in possession of any lands lying within this manor, called by the names of *Freebornes*, or *Gelyans*; or any other of the copyhold lands described in the surrender to *John Barker*, except the four acres called *Sbraggs*. Nor did it appear, that *James Maybew* was ever seised of any lands, either freehold or copyhold, called by the name of *Myses*; or that this respondent, or any of his ancestors, ever made any exchange with any of the other respondents, or any other person or persons, of lands lying within the said manor, or ever altered the antient boundaries thereof. That it was proved in the cause, that all the lands which the respondent *Barker*, or any of his ancestors were possessed of in the manor, contained no more than

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than sixteen acres in the whole, whereof only four acres, called *Sbraggs*, were copyhold; the other twelve acres called *Myfes*, being freehold: But according to the surrender made to *Barker*, the copyhold ought to contain fifteen acres and three roods. That the respondent *Barker* was always ready to be admitted to the remaining eleven acres and three roods of copyhold land, and to pay such fine as should be reasonably set for the same, together with all arrears of quit-rent; provided the land was so set out and described, as that he might be able to recover possession thereof: He was also willing that a commission should be awarded for this purpose, and had so offered in his answer to the appellant's bill. The respondent *Barker* therefore hoped, that if the House should be of opinion, that a commission ought to be awarded to set out these copyhold lands, it should be at the appellant's expence, being for his benefit and advantage; and that as this respondent had been guilty of no concealment or other default, he should have his costs.

And on behalf of the other respondents it was argued, that the several lands which they were in possession of, were mortgaged or conveyed to the several persons under whom they respectively claimed, not as copyhold, but as freehold lands; long before the pretended surrender from *Mayhew* to *Barker*, and the same had been ever since held and enjoyed accordingly. That no fraud or misbehaviour appeared, or was proved against these respondents, or any of them, or those under whom they respectively claimed, either in concealing copyhold lands, or in removing, defacing, or destroying ancient boundaries or landmarks; consequently, the appellant had no foundation in a Court of Equity, for the relief prayed against them by his bill; and the rather, because they were purchasers of their said lands, as freehold lands, for a valuable consideration, and without notice that any copyhold lands were intermixed therewith. That the appellant had already had a commission for the examination of witnesses, to prove and support the pretended equity of his bill; and under that commission he might have examined to the several matters, for which he would now have another commission, and so put the respondents to double expence of the like nature, for one and the same thing. That the trial at law directed by the decree, was agreeable to the constant course and practice of the Court in like cases; and being to bind and determine the right and inheritance of the lands in question,

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DECREE
reversed.
Jour. vol. 22.
p. 630.

was the undoubted birthright of the subjects of this realm, who ought not to be bound or affected in their rights or inheritances, without a trial by a jury of their own countrymen. That the same evidence might by order, be produced and laid before a jury, as could be had upon an enquiry before Commissioners; and the jury being upon oath, which the Commissioners were not, it would undoubtedly determine them to make the more strict and impartial enquiry, concerning the matters submitted to their decision. And therefore it was hoped, that the decree would appear just, and be affirmed.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree complained of should be reversed; and that the Court of Exchequer should award a commission, directed to such persons as they should think proper, to enquire whether all, or any and which of the lands contained in the surrender made by *James Mayhew*, on the 14th of *October*, 1703, were in the possession of all, or any and which of the respondents; and whether all or any of the freehold lands whereof the said *James Mayhew* was seised, were in the possession of all or any and which of the respondents; and that the Court should direct, that the respondents should have liberty to inspect the Court rolls, and to take copies, as they should think fit, at their expence; and that the respondents should upon oath, within a convenient time to be appointed by the said Court of Exchequer, bring before and leave with the Remembrancer of that Court, all such deeds, copies, writings and other evidences, relating to the matters in question, as were in their respective custodies or power; and that the appellant should have liberty to inspect them, and take copies at his expence; and that such of the said deeds, copies, writings, evidences, and Court rolls, as either side should require, within ten days before the execution of the commission, should be produced at the execution of the said commission; and upon the return thereof, the Court of Exchequer were to make such further order thereon, as should be just.*

* A commission accordingly issued, and the return of it appears in *Bunbury* 251. But on searching the Exchequer Chamber minute book No. 7. it appears, that this return was on the 28th of *October*, 1728, quashed for uncertainty, and a new commission ordered. I do not however, find any subsequent proceedings in the cause.

Margaret Parker, Widow of Christopher } Appellant,
Parker, Esq;

Case 26.

Edward Harvey, Esq; Thomas Stanley, }
Esq; and Catherine his Wife, sister }
and Heir at law of the said Christopher } Respondents.
Parker, Hannah Dixon, Executrix of }
Edward Dixon her late Husband, and }
Sarah Dobson, Executrix of John }
Dobson her late Husband, }

2d May, 1726.

BY indenture dated the 16th of May, 1707, Christopher Parker, the appellant's late husband, mortgaged several closes and parcels of land in Birchholme and Waddington, in the county of Lancaster, of 68*l.* 4*s.* per ann. clear rent, to William Peere Williams, Esq; for the term of 1000 years for securing 500*l.* and interest; and afterwards borrowed of Mr. Peere Williams the further sum of 100*l.* which was likewise secured on the said premises, by way of indorsement on the mortgage.

Viner, vol. 6.
p. 367. ca. 21.
vol. 7. p. 400.
ca. 27.
vol. 11. p. 181.
ca. 20. 292.
ca. 39.
vol. 14. p. 458.
ca. 15. 16.
2 Eq. ca. ab.
241. ca. 25.
280. ca. 6.
460. ca. 9.
532. ca. 18.
20.627. ca. 3.

By indentures of lease and release, dated the 14th and 15th of July, 1710, in consideration of a marriage then intended and afterwards had, between the said Christopher and the appellant, and of 3000*l.* portion; the said Christopher Parker conveyed to trustees and their heirs, the mortgaged premises, and divers other lands and hereditaments, in the counties of Lancaster and York, to the use of himself for life; remainder to the appellant for life, for her jointure; remainder to the issue of that marriage, with remainder to himself in fee. And he thereby covenanted, that he was seised in fee of all the premises; and that the appellant's jointure estate was, and should continue 350*l.* per ann. beyond all reprises, parliamentary taxes excepted, and free of all incumbrances, save only the before mentioned mortgage to Mr. Peere Williams, which was to be immediately paid off, and the term to be assigned to Thomas Jenkins, Esq; in trust to attend the uses limited by the said indenture

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indenture of release; which was soon afterwards done, and the term assigned accordingly.

At the time of making this settlement, other part of the jointure lands, situate in *Clitherow*, in the county of *Lancaster*, were in mortgage to the respondent *Harvey* and his heirs, for 200*l.* and interest, by indentures of lease and release dated the 20th and 21st of *July*, 1707; and by several sums of money afterwards borrowed, and indorsed upon that mortgage, the principal money due thereon, at the death of the said *Christopher Parker*, was increased to 500*l.*

In *August*, 1712, the said *Christopher* mortgaged other part of his estate to Mr. *Peere Williams*, for the residue of, certain terms for years, for securing 200*l.* and interest, which continued due at his death. — And he was likewise at his death, indebted to *Edward Dixon* in 400*l.* principal money, secured by two several judgments of 200*l.* each, entered up about *Hilary* term, 1711.

In *January*, 1712, *Christopher Parker* died without issue, having first made his will, and thereby directed, that all his just debts should be in the first place paid and fully satisfied; and for that purpose did will and appoint, that all his personal estate should be in the first place sold, and applied towards the payment of his debts; and then such part of his freehold, leasehold and copyhold estate, should be likewise sold and applied for the discharging such part of his debts, as his personal estate should fall short to do, at the discretion of his executrix, the manor of *Bradkirke* only excepted; and of his said will made the appellant executrix, but she renouncing, the respondent *Catherine Stanley*, the testator's sister and heir at law, took out administration with his will annexed.

Soon after the death of the said *Christopher*, the respondent *Harvey* paid off Mr. *Williams* and took an assignment of his last mentioned mortgage, in the names of *Ayliff* and *Bridges*, his trustees. — And he likewise took an assignment of the two judgments to *Dixon*.

Having so done, the respondent *Harvey* in *Trinity* term, 1713, exhibited a bill in Chancery in his own name, and in the names of *Ayliff*, *Bridges* and *Dixon*, against the appellant and

and the respondents *Stanley* and his wife and others, for an account of the real and personal estate of the said *Christopher Parker*, and to be paid the several principal sums and interest above mentioned to be due to him, or that the equity of redemption of the mortgaged premises might be foreclosed; and that what should be due to him, over and above the value of the said mortgaged premises, might be paid him according to the said *Christopher's* will, out of his other estates. — And the appellant finding her jointure lands to fall greatly short of 350*l.* *per ann.* did, about the same time, exhibit her bill in Chancery against the respondents *Stanley* and his wife and others, to have the deficiency of her jointure lands made good to her, according to her husband's covenant; and likewise to have the benefit of the 1000 years term assigned to *Jenkins*, and to be reimbursed several sums of money which she had, since her husband's death, paid to several of his creditors; and also to have her jewels and *paraphernalia* decreed to her.

The respondents *Stanley* and his wife, by their answer to the original bill insisted, that *Mary Parker* the mother of *Christopher* and of Mrs. *Stanley*, being possessed of a very considerable sum of money in her widowhood, purchased lands and tenements in *Clitherow*, of which the lands comprised in the mortgage to *Harvey* were part; and that by her will dated the 1st of July, 1703, she gave 2000*l.* to the respondent *Catherine*, to be paid her by her son *Christopher* at her age of 21, or marriage; and 60*l.* *per ann.* maintenance in the mean time, to be paid quarterly, and charged her whole real and personal estate therewith; and also gave the respondent *Catherine*, one half of all her household goods and plate; and she gave to her son *Christopher*, all her manors, messuages, lands, tenements and hereditaments, whatsoever and wheresoever, to hold to him and his heirs, from and immediately after his age of 21; and in the mean time directed, that the rents and profits thereof should be received by her executor, and laid out in the education and maintenance of her said son; and declared, that if either of her said children should die before 21, or before her daughter *Catherine* should be married, or her son *Christopher* should have children, that then the survivor should be heir to the deceased, and have the whole estate. And therefore the respondents further insisted, that *Christopher* being dead without issue, they were become entitled to the said premises in *Clitherow*; and that

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that no conveyance or mortgage, pretended to be made by him, could take place or deprive them from enjoying the benefit of the said will.

The other defendants having put in their answers, and issue being joined, and witnesses examined in both causes; they came on to be heard together, before the Lord Chancellor *Cowper*, on the 9th of May, 1715, when his Lordship was pleased to declare, that the lands in *Clitherow*, part whereof were mortgaged to the respondent *Harvey*, and also comprised in the appellant's jointure, for want of a fine and recovery by *Christopher*, did on his death without issue, belong to the respondent *Catherine Stanley* and her heirs, by virtue of the will of her mother *Mary Parker*; and that they were not liable to any of the debts of the said *Christopher* her brother; and therefore decreed the same to be held and enjoyed accordingly, by the respondents *Stanley* and his wife: And it was further ordered and decreed, that the lands and premises in mortgage to Mr. *Peere Williams*, and by him assigned in trust for the respondent *Harvey*, should be sold by the Master to the best purchaser; who was to compute what was due to the respondent *Harvey*, for the 200*l.* by him advanced to Mr. *Peere Williams*, with the interest thereof, which was to be paid him in the first place, out of the money arising by such sale; and the overplus was to be retained by or paid over to him, towards satisfaction of his other demands; and the Master was directed to look into the reality of the respondent *Harvey's* securities and incumbrances, and state what was due to him for principal and interest thereon; and what, upon such account, should be found due to the respondent *Harvey* for principal and interest, he was to receive a satisfaction for out of the real and personal estate of the said *Christopher* made liable by his will to the payment of his debts, in equal degree with his other creditors then before the Court.

And upon the appellant's bill, it was referred to the Master, to take an account of her late husband's real estate, whereof he died seised in fee, and which, by his will, was subjected to the payment of his debts, and of the yearly value thereof; and what was to be the yearly value of the appellant's jointure; and to certify what was the clear yearly value of such lands, and what they had fallen short of the yearly value, which, by

the marriage settlement, the same was to have been; and whether the jointure estate was subject to any, and what incumbrances, prior to the marriage settlement; and what the appellant was damnified by her said husband's covenant being broken, as well for the time past, as to come; and the Master was to make an estimate of the value of the appellant's estate for life therein, and for so much as should be so certified to be due, the appellant was to receive a satisfaction out of her husband's real and personal estate subject to the payment of his debts, with the other creditors in equal degree, then before the Court: And for that purpose, the real estate of the said *Christopher* whereof he died seised, and which was subject to his debts, and the reversion of the appellant's jointure, was to be sold before the Master; and the money arising by such sale, was to be brought before the Master, who was to apply the same to and amongst the said *Christopher Parker's* creditors, then before the Court, in equal degree, and proportionably to their respective demands, in such manner as before directed; and the residue of the purchase money was to remain in the Master's hands, subject to the directions after given concerning the same. And the Master was also to see what debts of the said *Christopher* the appellant had paid since his death, and for which she was to stand in the place of such creditors, and to receive a satisfaction for the same, in equal degree with her husband's other creditors; and in taking the account of the testator's debts, the Master was to distinguish what debts were due by specialty, and what by simple contract; and the creditors of the said *Christopher*, who were no parties to the suit, were at liberty to come before the Master, and to prove and make out their debts; they, in the first place, paying their proportion of the charges of the said suits; and the consideration how and in what manner those debts should be paid, was reserved till after the Master's report. And the appellant's jewels were to wait the said account, till it was seen whether the estate liable to the payment of the debts was sufficient, without resorting thereto; and it was further ordered and decreed, that the respondents *Stanley* and his wife should come to an account before the Master, for the rents and profits of the real estate belonging to the said *Christopher*, which were received by, or came to the hands of the said *Mary Parker*, his mother, as his guardian during his infancy; in the taking of which

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which account, the Master was to make a proper allowance for the maintenance of the said *Christopher*, during his infancy, together with all other just allowances; and in like manner an account was to be taken, as between *Christopher* and *Stanley* and his wife, and *Christopher* was to be charged with what should appear to be the value of the household goods and plate of the said *Mary*, devised by her will to the respondent *Catherine*, as also of her personal estate, which at any time came to the hands of the said *Christopher*, as also with the rents and profits of the real and chattel estates belonging to *Mary*, which were received by or came to the hands of *Christopher*: In the taking of which last mentioned accounts, the Master was to make an allowance for such debts of the said *Mary*, as were paid off and discharged by *Christopher*, together with all other just allowances; and if, in taking the said accounts, the said *Christopher* should be found to be a creditor of his said mother, over and above what he received out of her estate, the same was to be made good to his personal estate, out of the real estate and assets, which were devised to the respondent *Catherine*; but if *Christopher* should be found debtor to his mother's estate, then the respondents *Stanley* and his wife, the administratrix of *Christopher*, were to retain so much as should be found due to them out of the personal estate of *Christopher*, come to their hands, according to a course of administration; of which said personal estate, an account was likewise directed to be taken; and all parties were, in the first place, to have their costs out of the said estate, except only the respondent *Harvey*, who was to be paid his costs when he received his money, in such manner as before directed.

On the 27th of *July*, 1721, the Master made his report; and thereby certified to be due to the respondent *Harvey*, on the mortgage assigned in trust for him by Mr. *Williams*, 304*l.* for principal and interest, and 93*l.* 2*s.* 0*d.* for his costs, amounting in the whole to 397*l.* 2*s.* 0*d.* and on the other mortgage made to the respondent *Harvey* himself, 792*l.* 11*s.* 7*d.* and on the judgments assigned to him by *Dixon*, 631*l.* 12*s.* 7*d.* —The Master also certified the appellant's jointure estate to be only 187*l.* 14*s.* 3*d.* per ann.; and that, as a compensation to her for the deficiency, she was then entitled to 2779*l.* 9*s.* 3*d.*; and that the appellant had paid to her husband's creditors several sums, amounting to 158*l.* 13*s.* 3*d.* —That there had come to the

the hands of the respondent *Stanley* and his wife, of the personal estate of *Christopher*, 644 *l.* 1 *s.* 11 *d.* out of which was deducted 504 *l.* 18 *s.* 8 *d.* for the funeral charges and debts of the said *Christopher*, paid by them; and on the balance of that account, the Master certified them to be creditors upon the said *Christopher's* estate, in 1244 *l.* 7 *s.*—The Master further certified, that several creditors, not parties to the suit, had come before him and proved their debts, to the amount of 1588 *l.* 3 *s.* 11 *d.*; and computed all the debts of *Christopher* to be 7789 *l.* 10 *s.* 1 *d.*

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The lands comprised in Mr. *Williams's* mortgage, and by him assigned in trust for the respondent *Harvey*, were afterwards sold for 950 *l.* and the money being brought before the Master, was by him paid to the respondent *Harvey*, which was 690 *l.* 19 *s.* 11 *d.* more than was due to him, in respect of that mortgage, either for principal and interest, or his costs; he having before received, on account of those costs, 77 *l.* 12 *s.*

The other estates of the said *Christopher*, including the reversion of the appellant's jointure, were likewise sold; and the whole money brought before the Master, on account of the sale of the said *Christopher's* estates, was 5239 *l.* 11 *s.* out of which the Master paid, towards the costs of the several parties, 585 *l.* 11 *s.*; so that there then remained in his hands, to be divided between the appellant and respondent *Harvey*, towards satisfying their several other demands, 3704 *l.* besides the appellant's jewels.

On the 29th of *January*, 1723, the causes were heard before the Lord Chancellor *Macclesfield*, on the equity reserved after the Master's report; when his Lordship was pleased to order, that public notice should be given in the *Gazette*, for such of the creditors of the said *Christopher*, who had not proved their debts, to come in and prove the same, in order to receive a satisfaction, in proportion with the other creditors; and if they should not prove the same before *Easter* then next, they were to be excluded the benefit of the said decree; and the Master was to carry on the account, as to the creditors who had proved their debts, and compute interest for such debts as he had allowed interest for, from the time of his report; and the Master was to sell the jewels so brought before him, and the

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money arising by sale thereof, and also the other money in the Master's hands, was to be apportioned between the several creditors, who had, or should prove their debts, by the time aforesaid, to be paid them by the Master; first deducting thereout, each party's proportion of the charges of the suit; and the Master was to enquire and see, what the appellant had paid and disbursed in carrying on those suits, more than her proportion of the charges thereof; in the taking of which account, the Master was not to tax the bill, as between plaintiff and defendant, but to make the appellant all just and reasonable allowances; and the Master was also to enquire and see, what the appellant had received towards satisfaction thereof, and what should appear to be remaining due to her, in respect of such costs, was to be paid her in the first place, out of the money in the Master's hands; and the creditors, who had already received satisfaction, were to pay their proportion of the said costs, to be apportioned by the Master, according to what they had received, and was coming to the rest of the creditors, who were not then paid, and should prove their debts before the Master, by the time aforesaid.

The causes being reheard, upon the petition of *Dixon* and *Dobson*, as judgment creditors, on the 20th of *July*, 1724; his Lordship was pleased to declare, that the judgment creditors of *Christopher* ought to be paid their principal, interest and costs, in the first place, out of the money arising by the sale of the jewels, and the other money in the Master's hands; and that the rest of the creditors ought to be paid in proportion, as far as the residue of the monies would extend, and ordered the same accordingly; and referred it back to the Master, to carry on the interest of such debts, as he had allowed interest for, and to tax the parties their subsequent costs.

And in pursuance of this last order, the Master, by two reports, dated the 17th of *February*, 1724, certified to be due on *Dixon's* judgment for principal, interest and costs, 732*l.* 17*s.* 11*d.*; and on *Dobson's* judgment, 381*l.* 6*s.* 8*d.*

T. Lutwyche.
C. Robins.

From the original decree, and the several subsequent proceedings and orders made in pursuance thereof, the present appeal was brought; and on the appellant's behalf it was argued, that by the original decree, she was to receive a satisfaction out of her

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her husband's real and personal estate, in equal degree with the other creditors then before the Court, and the money arising by sale of the estate, was to be applied accordingly; and that this decree being signed and inrolled, ought not to have been varied by the subsequent orders, whereby the other creditors, and particularly those by simple contract, were let in to be paid equally with the appellant, who was a specialty creditor, and had a prior mortgage term of her jointure lands assigned, to protect her jointure from incumbrances. But if this decree might be varied by the subsequent orders, yet, as the appellant was a specialty creditor by covenant, wherein her husband had bound himself and his heirs, she had a real lien on the freehold estate, which the simple contract creditors had not; and as the will did not direct the whole estate to be sold for the payment of debts, but expressly excepted the manor of *Bradkirke*; that part of the estate so excepted, was real assets descended, and was liable to the specialty creditors then before the Court, in preference to any others, either of equal or inferior degree. That since obtaining the last order, and the Master's reports thereon, the respondent *Harvey* insisted to apply the 631*l.* 19*s.* 11*d.* which remained in his hands of the 950*l.* paid him by the Master, beyond what was due to him in respect of the 200*l.* mortgage, and for his costs, wholly to the payment of his 500*l.* mortgage, which had turned out deficient, because of the respondent Mrs. *Stanley's* being entitled to the whole of the lands comprised in that mortgage, and also to part of the lands comprised in the appellant's jointure; so that Mr. *Harvey* and the appellant were creditors of her late husband no otherwise, than by virtue of the covenants in their respective securities, and therefore he had no right to any preference in respect of the 500*l.* mortgage; but the appellant had more right to all the money arising by the sale of the lands mortgaged to Mr. *Peere Williams*, because they were assigned to protect her jointure.—The respondent *Harvey* had also, by virtue of the order of the 29th of *July*, 1724, been paid the 709*l.* 7*s.* 3*d.* due on the two judgments, in preference to the appellant; but by the express provision and meaning of the original decree, he had no right to any such preference. By that decree, the respondents *Stanley* and wife were to retain the personal estate towards satisfaction of their debt, which was now reported to be 1244*l.* 7*s.* in a course of administration; but by the order of the 29th of *January*, 1723, it was made payable in equal degree

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degree with the appellant's demand, but which ought not to have been; for in case her husband had been indebted to his mother's estate, on the balance of the account, that debt could only be a debt by simple contract; and therefore ought not to be paid in equal degree with the appellant's demand, which was for the deficiency of her jointure. That by the order of the 20th of July, 1724, such of the debts as carried interest, were to have interest computed and carried on to the time of payment; but no provision whatever was made by either of the two last orders, for the appellant's having interest for any part of her demand, from the time of its being stated and settled by the Master, altho' it was now upwards of fourteen years since her husband's death; during all which time, she had been a loser of above 160*l.* *per ann.* on account of her jointure, of which she was a purchaser for the most valuable of all considerations; besides the great trouble and expence which she had been put to, in the prosecuting these suits. It was therefore hoped, that the said decrees or orders, and the subsequent proceedings in pursuance thereof, would be varied in the several respects before mentioned, and proper directions given for the appellant's relief.

C. Talbot.

J. Idle.

On the part of the respondent *Harvey*, it was insisted, that he was entitled to the whole 950*l.* arising from the sale of the premises mortgaged to Mr. *Peere Williams*; because, by the original decree, the money thereby arising was, in the first place, to be applied in discharge of that mortgage, and then the overplus was to be paid in satisfaction of the respondent's other demands; but which overplus was not sufficient for that purpose, as appeared by the Master's report: Besides, this 950*l.* had been paid to this respondent, by the consent of the appellant herself, and the other parties in the cause. That it did not appear, that the original decree was founded upon a persuasion, that there would be more than sufficient to make good the appellant's jointure, and pay the respondent's demands; but if it did so appear, the appellant would not thereby be entitled to the 1000 years term assigned to *Jenkins*; because that term, as the appellant shewed by her appeal, was so assigned to protect the freehold reversion and inheritance of the premises, according to the uses of the settlement; one only of which uses regarded the appellant, *viz.* the use to her, after the said *Christopher Parker's* death, for her life, during which time she was entitled

entitled to, and still enjoyed the protection of that term; but as she was not entitled to, nor pretended to claim the value of the inheritance, so she was not entitled to the value of the term, distinct from the inheritance; because the term was intended to go along with and protect the inheritance. And, that no provision was made by the decree, for the appellant's having interest for her demands; because those demands resting upon the covenant in damages only, did not carry interest.

On the part of the respondents *Stanley* and wife it was contended, that as to the appellant's claim of priority under the assignment of the 1000 years term, she had made no such case by her bill, nor thereby sought any benefit of that term; nor was this satisfied mortgage and assignment ever proved in the cause, or produced, or offered to be read at the hearing; nor did the appellant ever set it up, or insist upon any benefit of it, save only by her appeal. On the contrary, her own bill was so far from furnishing any deficiency in the value of the estate to make her a satisfaction, that it expressly charged her husband's estate, subject to his debts, and by his will devised to be sold, together with his personal estate, and the reversion of her jointure, to be more than sufficient to satisfy her demands, and all his other debts; and therefore prayed a sale thereof, for those purposes: And for this she could have had no foundation, if her husband had not made such a will, under which every creditor had as good an equity to be satisfied his debt, as the appellant; who, at most, could only be considered as a creditor for what she was damnified by her husband's breach of covenant. But if it were possible for such an irregular attempt to succeed, it tended only to set up a satisfied incumbrance to give the appellant a preference to her husband's other just and honest creditors, and who, in all events, must lose the greatest part of their debts; at the same time that she sought to partake of the fund, which he had appointed for the satisfaction of them all. That the whole debt due to these respondents, appeared by the Master's report to be 1383*l.* 10*s.* 3*d.* whereout they were allowed to retain only 139*l.* 3*s.* 9*d.* and were by that report to be paid the 1244*l.* 7*s.* residue thereof, out of the estate devised by the testator for the payment of all his debts, in equal degree with his other creditors then before the Court; and under such a general devise, this was highly just and equitable, because the testator was as justly indebted to these respondents,

P. Yorke.

N. Fazakerley.

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as to any other of his creditors; and as by his will he had made no distinction between his creditors, equity would give no preference to any of them. That as to interest upon the appellant's demands, she was not entitled to any, and therefore it was not asked, nor even reserved by the decree, and consequently could not be given to her by any of the subsequent orders. And as to the appellant's great costs and charges in carrying on these suits, she certainly complained of an order made evidently in her favour; it not being usual for the Court of Chancery to make such a distinction in the taxing of costs, as in this case had been made. For all which reasons it was hoped, that the present appeal, as against these respondents, would be dismissed with costs.

C. Talbot.

J. Strange.

And on the part of the respondents *Dixon* and *Dobson*, it was insisted, that there could be no reason for reversing the decree and the subsequent proceedings thereon, as to the respondent *Dixon*, she being an original plaintiff in the cause; neither could there be any objection as to the respondent *Dobson*, for, by the appellant's own shewing, there was liberty reserved by the decree for the creditors who were no parties to the suit, to come in before the Master and prove their debts; which she accordingly did, and the consideration how the same should be paid, was reserved until after the Master should have made his report. Besides, both these respondents were creditors by judgment, and consequently had a lien upon the real estates which had been sold, and were entitled to a preference, even against the personal assets, before the debts by specialty and simple contract.

ORDERS
reversed
in part.

Jour. vol. 22.
p. 669.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that so much of the several orders appealed from, whereby 631*l.* 12*s.* 7*d.* was directed to be paid to the respondent *Harvey*, over and above the principal, interest and costs due on the mortgage assigned to him by Mr. *Peere Williams*, should be reversed; and that the said 631*l.* 12*s.* 7*d.* should be applied in equal proportion, towards the debt due to the appellant, to be computed according to the sum stated to be due to her, with interest for the same from the time of such stating; the debt due to the respondent *Harvey*, and the debts due to the other creditors by specialty; and that so much of the orders appealed from, as directed the application of 1244*l.* 7*s.* to the payment of the respondent *Stanley's* demands, in equal degree with the

other creditors, should be reversed; and that an account should be taken by one of the Masters of the Court of Chancery, of the reality of the respondent *Stanley's* debt, how it became due, and whether by specialty; and to report the same to the said Court, who were to do thereon as should be just: And it was further ORDERED and ADJUDGED, that the rest and residue of the orders complained of, should be affirmed.

Samuel Pratt, Administrator of *Nathaniel Jackson*, - - - - - } Appellant. Case 27.

Mary Jackson, Widow of the said *Nathaniel Jackson*, - - - - - } Respondent.

1st February, 1726.

BY articles dated the 29th of December, 1713, previous to and in consideration of the marriage of *Nathaniel Jackson*, deceased, with the respondent then *Mary Burrow*, widow, the said *Nathaniel Jackson* for providing a competent provision and jointure for the respondent, in full recompence and bar of dower, thirds, or other demands whatsoever, which she might have out of his real or personal estate, by the common or statute law, or custom, or otherwise howsoever; (except as therein was excepted or provided) covenanted and agreed with trustees, that he would within six months after the marriage, settle and assure an estate of inheritance in fee simple, within 40 miles of London, of 300*L.* per ann. free from all incumbrances, to the use of himself for life; remainder to the respondent for her life, for her jointure; with divers remainders over, for the issue of that marriage; and afterwards, the reversion to the said *Nathaniel Jackson* and his heirs. — And reciting, that the respondent had three daughters by her late husband *Jonathan Burrow*, deceased, who had made her executrix of his will, viz. *Mary*, *Rebecca*, and *Hannah*; and that she was possessed of, or entitled to some personal estate of her own, which it was thereby agreed, the said *Nathaniel Jackson* should have no power over, but that the same should remain to the sole and separate use of her and her children; the said *Nathaniel Jackson* thereby covenanted

2 Wms. 302.
Viner, vol. 8.
p. 280. ca. 25.
vol. 14. p. 113.
ca. 5.
2 Eq. ca. 29.
325. ca. 29.

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covenanted with the trustees, not to intermeddle therewith, and disclaimed all right thereto. — And he also covenanted with the trustees, in case the marriage took effect, to pay the said three children 1000*l.* a-piece, at their respective ages of 21, or marriage; and if any of them should die, such child's portion should go to the survivors, or survivor; and likewise to educate and keep them in the mean time, during the joint lives of himself and the respondent; and after the decease of either of them, to pay interest for the money after the rate of 6*l.* per cent. per ann. And the respondent did thereby release and disclaim all dower, thirds, claims and demands, in or out of the real or personal estates of the said *Nathaniel Jackson*, by the common law, or custom of *London*, or any other custom or usage whatsoever, except as aforesaid: And then follows this exception. “ Provided always nevertheless, and it is the true intent
 “ and meaning of these presents, and of all the parties hereunto,
 “ that these presents, or any thing herein contained, shall not
 “ extend, or be construed to extend, to bar, release, or hinder
 “ the said *Mary* from having, claiming and enjoying any
 “ legacy or bequest, the said *Nathaniel Jackson* shall or may,
 “ by his last will and testament in writing, duly published in
 “ the presence of, and attested by three or more credible witnesses, give, devise, or bequeath unto, or for the use or benefit
 “ of the said *Mary*; nor to all or any the household goods
 “ or utensils of household stuff, rings, plate, jewels, or linen,
 “ of him the said *Nathaniel Jackson*, at the time of his death;
 “ all which he doth hereby agree shall be had, received and
 “ enjoyed by the said *Mary*, her executors, administrators, or
 “ assigns.”

The marriage took effect on the 9th of *February* following, and the said *Nathaniel Jackson* died on the 22d of *May* next after the articles, without issue and intestate, whereupon the appellant obtained letters of administration.

After his death, the manor of *Rookwood Hall* in *Essex*, of 248*l.* per ann. was settled towards the jointure of 300*l.* per ann. and the residue was to be settled when a convenient purchase could be provided; and in the mean time, the residue to make up the 300*l.* per ann. was accounted for in money: The several portions also of 1000*l.* a-piece for the respondents three daughters, were all paid; and the respondent, in pursuance of the articles,

articles, received all the household goods and utensils of household stuff in his dwelling-house, rings, plate, jewels, and linen; by which the appellant was advised that the articles were, in every particular, except as to making up the jointure, fully performed.

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But it happened, that Mr. *Jackson* was before his marriage, and at his death, possessed of an Hospital called *Fortune Hospital*, near *Gosport*, in the county of *Southampton*, which he employed in entertaining sick and wounded seamen of the Royal Navy, by contracts with the Commissioners; and which, for that purpose, was furnished with near seven hundred beds, and other furniture, suitable only for such a service, and not for private use; and these the respondent laid claim to as household goods, or utensils of household stuff, within the intent of the articles.

Whereupon two several suits were instituted in the Court of Chancery, by the appellant and respondent against each other, for a distribution of the intestate's personal estate; and in order to settle and adjust this claim. — And these causes being heard on the 2d of *July*, 1716, before the Lord Chancellor *Cowper*; it was, *inter alia*, ordered, that the Master should distinguish what were the proper goods of the intestate, comprised in the marriage articles; and what were the goods in the said Hospital belonging to the intestate, and not properly his household goods; and to state the same specially, for the judgment of the Court.

In pursuance of this decree, the Master, on the 16th of *June*, 1725, made his report; and thereby certified, that the said *Nathaniel Jackson* was possessed of the said Hospital which was employed for the entertainment of sick and wounded seamen; and for that purpose he had furnished it with beds, bedding and other furniture, and so continued it till his death; but whether they should be deemed household goods, or utensils of household stuff, within the intent of the articles, he submitted to the judgment of the Court; and in the mean time, by the consent of all parties, deferred enquiring into the value.

On hearing the special matter of this report, on the 10th of *November* following, before the Lord Chancellor *King*; his Lordship declared, that the marriage articles did extend to the

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household goods and utensils of household stuff in the said Hospital.

P. Yorke.

T. Lutwyche.

From this decree the administrator appealed, and on his behalf it was insisted, that the goods and utensils in the Hospital, were made use of by Mr. *Jackson* in a public business and undertaking, in the nature of a trade; at a place upwards of seventy miles distant from *London* where he lived, and where he never resided, or had so much as an apartment for his own use; but the whole undertaking was entirely carried on by agents and servants. That according to this construction, the respondent might have been entitled to the whole of her husband's personal estate; in case he had been of a trade wherein he might have employed his estate in household goods, or utensils of household, or wherein he might occasionally have laid out his money for improvement. That as so great a provision was, by the articles, made for the respondent and her three daughters by her former husband, without any consideration, except that of marriage only; it was presumed, that she was not entitled to any strained construction of the articles in her favour: And that therefore the said order would be reversed.

C. Talbot.

J. Willes.

On the other side it was contended, that the goods in question were plainly within the description of the words of the articles, *household goods, or utensils of household stuff*; and their being used for the sick and wounded seamen, did not make them less so. That there were no words in the articles, which shewed any intention to confine those general words to any special sort of household goods, in any particular place, or provided for any particular purpose: Or, that when Mr. *Jackson* agreed his wife should have *all*, his meaning only was, that she should have *some* of his household goods: But on the contrary, the words *all* or *any* in the articles, shewed an intention that they should be carried to their utmost extent, and that no such reservation or limitation was meant. That at the time of making the articles, the intestate was employed in the same business, and possessed of the same goods; and therefore could not make use of those general words, without having in view the case which had happened. That these goods were used by him, not in the way of trade or merchandize, but for the purpose of housekeeping in his own house, under the care of his own servants, and for the service of what might, in some sense,

be

be called his own family. That there was no reason to apprehend, that the parties would have excepted these goods, if the question had been put at the time of making the articles; as they were then in the possession and power of the intestate, and it might very reasonably be agreed, that these, as well as others, should be a provision for his wife. But if it were doubtful, whether the parties would have excepted them or not, if mentioned at the time of entering into the articles; even in that case, it would be safest to follow the words, which had a plain and certain meaning, rather than establish a sense upon the ground of a supposed intention, different from and unsupported by any words; which would tend to render the construction of deeds precarious and arbitrary, and in the present case, would make it very difficult to determine how far the words should extend.

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BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree complained of, should be reversed.

DECREE reversed.
JOUR. vol. 23.
p. 26.

The Master, Wardens, and Assistants, of } Appellants.
the Corporation of Trinity House,

Case 28.

Maltis Ryall, George Noble, and others, Respondents.

4th February, 1726.

THE appellants are seised in fee, of the ancient office of lastage and ballastage for ships in the river Thames; and of the sole right of ballasting of ships in the said river between London Bridge and the main sea eastward, which use and require ballastage to sail with, or to be put or taken into them respectively; and of selling all ballast materials, or merchandize to be used as ballast for them; and the lastage and ballasting, or loading of sand, gravel, soil, stones, earth, chalk, rubbish, clay, flints, lime, soap-ashes, bricks, tiles, or any other thing, merchandize or commodities whatsoever, taken from any wharf, creek, coast, bank, or shore, upon or adjoining to the river Thames, for lastage, ballastage, and ballasting or loading as aforesaid; and of the gravel, sand and soil of the said river, as

Viner, vol. 6.
p. 367. ca. 22.
2 Eq. ca. ab.
241. ca. 24.

solely

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solely belonging to them, together with the several antient fees, perquisites and profits, to the said office of lastage and ballastage belonging and appertaining.

This office was granted to the appellants, *inter alia*, for the better support, relief and maintenance of poor, maimed, and decayed seamen, their wives, widows and orphans, and other charitable uses; as well as to enable the appellants to cleanse and take care of the channel and navigation of the river *Thames*, within the limits aforesaid. And accordingly, the appellants are constantly at very great charges in cleansing and taking care of the said river, having not less than sixty ballast lighters and one hundred and twenty men constantly at work, upon the shelves and sand-banks of the river; and they also maintain ninety three alms-houses, and the poor people therein; and likewise relieve two thousand three hundred out-pensioners, consisting of decayed seamen, their wives, widows and orphans; to whom they pay 400*l.* at least monthly, and the greatest part of it out of the produce of this ballast-office.

In *Michaelmas* term, 1722, the appellants exhibited their bill in the Court of Chancery, against the respondents and others; charging, that the respondent *Ryall* was owner of a wharf on the river *Thames* between *London Bridge* and the main sea; and by virtue of several contracts with scavengers and rakers, had great quantities of dung and soil brought to his wharf, with which he had for three years last past furnished several of the other defendants, and other masters of ships in the said river, with ballast for their ships; and that the said respondent had ballasted a great number of ships, riding within the said limits with such dung and soil, and sold the same as ballast. — And the appellants by their said bill insisted, that all ballasting and selling of ballast, for ballasting of ships within the limits aforesaid, and of loam, sand, chalk, stones, rubbish, soil, or any other materials or merchandize, to be used as ballast, was against the appellants right, and a prejudice to their said ballast-office; and that dung was properly ballast as well as loam, sand and other materials. They therefore prayed, that the respondent *Ryall* might account with them for such dung and soil, or other materials, put on board such ships, and used as ballast; and that he might be enjoined for the future, from selling or disposing of such dung and soil, or other materials for ballast.

The respondent *Ryall* by his answer to this bill stated, that his father was for many years possessed of a dung wharf at a place called *Pickle Herring Stairs*, in the parish of *St. Olave, Southwark*, near the river *Thames*, and between *London Bridge* and the main sea eastward; that such wharf was then held by the respondent, and had been used as a dung wharf for upwards of 40 years; that he had contracted with scavengers and rakers, in and about *London*, for dung and soil to be brought to the said wharf, which he sold to several of the defendants and other persons, as manure for their land and gardens, but not for ballasting of ships; tho' he thought himself not concerned how they used the same, when on board: — That he cleared such dung or soil which he so sold, at the custom-house as merchandise; that the selling of manure for land to masters of ships, within the limits aforesaid, and especially to colliers, who return empty, had been an antient usage time out of mind; and therefore he put the appellants upon the proof of their exclusive right.

On the 1st of *June*, 1725, this cause was heard before Sir *Joseph Jekyll* and Sir *Jeffery Gilbert*, two of the then Lords Commissioners for the custody of the Great Seal; when their Lordships were pleased to decree a perpetual injunction, to restrain the respondent *Ryall* and the other defendants, from using any soil, or dung mixed with soil, for ballasting any ship or vessel going out of the river *Thames* between *London Bridge* and the main sea eastward; and decreed the respondent *Ryall* to account for all the monies received by him, or by any other person for his use, of the respondent *Noble*, for all the soil or dung mixed with soil, by him sold and put on board any ships or vessels, contrary to the appellants grants: In taking which account, the respondent *Ryall* was to have an allowance for the value of the soil, or dung mixed with soil, sold by him to the respondent *Noble*, and by them put on board any ship or vessel, or used by them for ballasting of any ship or vessel, within the limits aforesaid; and also of the charges of carrying such soil, or dung mixed with soil, on board such ships or vessels. And the respondent *Ryall* was decreed to pay to the appellants what upon such account should appear to be the clear profits of such soil, or dung mixed with soil, over and above such value and charges as aforesaid: But their Lordships did not think fit to give costs of suit on either side.

P. Yorke.
C. Wearg.

From this decree the appellants appealed; insisting, that the respondents ought to have been enjoined from using any dung, tho' not mixed with soil, for ballasting ships within the limits aforesaid; because dung alone might as well be used for ballast, as soil, or dung mixed with soil; and the ballasting with dung alone, would be attended with the same ill consequences with regard to the appellants, and would be equally prejudicial to their exclusive right of ballasting ships, within the limits of their charter; and which right had been established by a decree of the Court of Exchequer, on the 4th of May, 1712, and by a decree of the Court of Chancery in the year 1715. That by the decree in question, the respondent *Ryall* was to account only for the monies received by him of the respondent *Noble*, for all the soil, or dung mixed with soil, sold or put on board any ship or vessel, within the limits aforesaid, for ballast; whereas it was conceived, that *Ryall* ought to account with the appellants for all the dung sold by him, and put on board any ship within those limits for ballast, altho' such dung was not mixed with soil; and that the rather, because it would be impossible for the appellants to distinguish between dung, mixed and not mixed with soil. That the respondent *Ryall* ought also to account with the appellants, not only for all monies received of the respondent *Noble*, but likewise for what he received from any other person or persons, as well for all the dung, as for the soil and dung mixed with soil, sold or put on board any ships or vessels within the limits aforesaid, for ballasting; and the rather, in regard *Ryall*, by his answer admitted, that he had sold above 1300 tons of soil or dung to other persons, besides what he had sold to the respondent *Noble*. Lastly, that no costs of suit were decreed to the appellants, but which it was conceived they were entitled to; inasmuch as the respondent *Ryall* had made this suit necessary, by not admitting the general right of the appellants, which they had therefore been at great expence in proving, and with respect to which, they had eventually prevailed.

J. Willes.

N. Fazaker-
ley.

To all this it was answered, on the part of the respondent *Ryall*, that dung is in the nature of merchandize; and how reasonable soever it might be thought, to lay merchants under the obligation of taking their ballast from the appellants, where they made use of unprofitable materials for ballast, which could be of no other use to them; yet it was conceived to be most unreason-

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unreasonable, to extend this pretended right of the appellants so far, as to restrain the merchants from using their shipping to the best advantage, and oblige them to ballast their ships with unprofitable merchandize, when they could employ that room to profit and advantage, by using goods and merchandize as ballast. That it could make no legal, or reasonable difference, whether such goods and merchandize were dung, or any other valuable commodity; and tho' the appellants had, by their bill, insisted upon a right of ballasting, and of selling ballast or materials, or merchandize used as ballast; yet, it was apprehended, no such right was established. That it could never be intended, that the appellants, by virtue of their said office, should restrain any persons from taking in their ships or vessels, within the prescribed limits, any loading of merchandize; under pretence, that the same was, or might be used to ballast such ship or vessel: For if this were so, the taking in iron, lead or timber, might be deemed ballast; but which the appellants did not venture to insist upon. That dung had been exported as merchandize, for many years past, for the manuring of lands and gardens, and great profits had been thereby made; and the very dung sold by *Ryall*, was sold as merchandize, and as such, entered and cleared by him at the Custom-house; where he constantly received transires or cockets, which are in the nature of certificates, for the same; and therefore, as he did not sell this dung for ballast, it was conceived he was not answerable for what use the same might be put to, after it was shipped. That the decree was highly just and reasonable, in not ordering the respondent *Ryall* to pay the appellants their costs; because the bill charged him with taking a wharf, and keeping it in the nature of an office for ballasting ships and vessels; and that he did ballast several ships or vessels, within the limits; but the appellants totally failed in proving the same, altho' they examined witnesses for that purpose. Besides, the appellants, by their bill, insisted upon a right much larger than they had proved, viz. the sole right of ballasting all ships, and of selling ballast, or materials or merchandize to be used as ballast; and among many other things, to the sole right of loading lime, soap ashes, bricks, tiles, or any other things, merchandize or commodities whatsoever, taken from any wharf, creek, coast, bank or shore, upon or adjoining to the river *Thames*, for lading, ballasting, or ballasting or loading of ships, or

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or used instead thereof: But had made no proof to support such a general right. And therefore it was hoped, that the decree would be affirmed, and the appeal dismissed with costs.

DECREE
varied.
Jour. vol. 23.
p. 27.

BUT, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the perpetual injunction decreed by the Lords Commissioners in this cause, should be extended to restrain the respondents from using any soil or dung, as well as dung mixed with soil, for ballasting any ship or vessel, going out of the river *Thames*, between the bridge of the city of *London*, and the main sea eastward: And it was further ORDERED and ADJUDGED, that the respondent *Ryall* should come to an account with the appellants, before Mr. *Holford*, one of the Masters of the Court of Chancery, for all monies received by him, or by any other person for his use, of the respondent *Noble*, for all the soil or dung sold by him, and put on board any ship or vessel within the limits aforesaid, for ballasting of any ships or vessels; for the better taking of which account, the respondent *Ryall* was to be examined upon interrogatories, as the said Master should direct, and produce all books and papers of account relating thereto, upon oath, before the Master; and what upon the said account should appear to have been so received, the respondent *Ryall* was to pay the same to the appellants: And it was further ORDERED, that the Master should tax the appellants costs of the said suit; and that the same, when so taxed, should be paid to them by the respondent *Ryall*.

Case 29. *Thomas Anderton*, - Plaintiff }
Jane Magawley, Widow, Defendant } in Error.

9th February, 1726.

Viner, vol. 12.
p. 121. ca. 3.
124. ca. 3.

THE Commissioners of the forfeited estates in *Ireland*, by indenture of bargain and sale, dated the 19th of *June*, 1703, and inrolled in the Court of Chancery there, in consideration of 3705*l.* bargained and sold to the Governor and Company for making hollow sword-blades in *England*, several

several lands and tenements in *Kilcolmuck*, alias *Kilcormuck*, *Ballycolane*, *Currahmore*, *Kilduffe*, *Downe*, *Gurteen* and *Killyshell* in *King's* county, which were the estate and inheritance of *Thomas Leiceſter*, attainted of high treason, and all other the lands of the ſaid *Thomas Leiceſter* in *King's* county, to hold to them, their ſucceſſors and aſſigns for ever; ſubject to a quit-rent to the Crown, and to all the claims and demands which had been allowed by the ſaid truſtees, out of the premiſſes. And ſoon afterwards, the Company ſold the ſaid premiſſes to *Francis Edwards*, Eſq; for a valuable conſideration.

In *Trinity* term, 1717, the plaintiff brought an ejection for the premiſſes, in the Court of Exchequer in *Ireland*, againſt the defendant, and alſo againſt *Luke Nugent*, ſon and heir of *Mary Nugent*, deceased, who, together with the defendant, were the ſiſters and coheireſſes of the ſaid *Thomas Leiceſter*; and declared on a double demiſe, viz. on the demiſe of the Sword-blade Company, and on the demiſe of the ſaid *Francis Edwards*: To which declaration, the defendants pleaded not guilty.

In *Eaſter* term, 1718, this ejection was tried at bar; and a verdict being given for the plaintiff, the defendants tendered to the Court a bill of exceptions, which was afterwards ſigned by two of the Barons, and was to this effect, viz. that the plaintiff gave in evidence an inquiſition, reciting the commiſſion upon which it was taken, dated *Decimo Februarii, 7^o Williel.* by which inquiſition it was found, that *Thomas Leiceſter*, late of *Ballyboy* in *King's* county, Gent. 1 *November*, 2 *Williel.* & *Maria*, was ſeiſed in his demeſne as of fee of the ſaid lands; and being ſo ſeiſed, he, on the ſaid 1^{ſt} of *November*, traiterouſly took up arms, and entered into actual rebellion, and levied war againſt the ſaid King and Queen; and afterwards, viz. 26th of *March*, 3 *Williel.* & *Maria*, died in the ſame actual rebellion; and that all the ſaid lands, by reaſon of the ſaid treason and death of the ſaid *Thomas Leiceſter* in rebellion, were forfeited to the King, in right of his crown *.

* This inquiſition was taken at *Philip's* town in *King's* county, on the 12th of *March*, 1695; as appeared by another inquiſition of that date, which was proved to be taken upon the ſame commiſſion, and at the ſame time and place.

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To this the defendant's counsel objected, that the record of the inquisition ought not to have been given in evidence, till such commission as was mentioned in the title of the record, was produced, to warrant the caption of such inquisition; and for that, upon view thereof it appeared, that several words were wanting, or not legible, without which it was imperfect and insufficient.

That thereupon the plaintiff proved by witnesses, that a commission issued out of the Court of Chancery, under the Great Seal of *Ireland*, by virtue whereof the said inquisition was taken; that the said commission was lost; that the several parts of the inquisition which were wanting and not legible, were eaten out by vermin, in the office of the Rolls of the Chancery of *Ireland*; that there were many inquisitions in the said office, taken in the time of King *Charles I.* without any commission annexed; and that there was not one of a hundred of the inquisitions remaining in the said office, taken in and before the year 1641, that had the commission annexed.

That the plaintiff also gave in evidence, an act of Parliament made at *Dublin*, 9 *Williel. III.* entitled, "An act to hinder
 " the reversal of several outlawries and attainders, and to
 " prevent the return of subjects of this kingdom, who had gone
 " into the dominions of the *French King in Europe.*" Whereby it is enacted, That all papists, or reputed papists, that have been guilty of the said rebellion in this kingdom, against his Majesty, and her late Majesty the Queen, and who (by any inquisition already taken by the oaths of twelve men and returned, or that shall be taken by the oaths of twelve men and returned within the space of two years, from the 1st day of *September*, 1697,) have, or shall be found to have died, or been slain in their said actual rebellion, before the 3d day of *October*, 1691, shall, by authority of this act, be convicted and attainted of high treason; and shall incur the penalties and forfeitures that traitors, attainted by the ordinary course of proceedings in cases of high treason, by the laws of this realm now in being, ought to suffer and undergo.—And, that whosoever any such papists heretofore have been found to have been slain, or to have died in the said rebellion against his Majesty, and her late Majesty the Queen, before the 3d day of *October*, 1691, by inquisition taken upon the oaths of twelve men of the county where

where such papists have committed such rebellion and treason; the said papists, or reputed papists, so found to have been slain, or to have died in rebellion against his Majesty, and her late Majesty the Queen, shall, at all times hereafter, be adjudged and deemed, and are hereby declared to be traitors attainted, to all intents and purposes, and to have incurred all such penalties and forfeitures of estate, real and personal, from the time he or they shall, by such inquisition, be found to have committed, or been guilty of the said rebellion and treason, as if he or they had been attainted of any such rebellion and treason, by judgment upon verdict or outlawry.

That the plaintiff gave in evidence another act of Parliament, made at *Westminster*, 11 & 12 *Williel.* entitled, "An act for granting an aid to his Majesty, by the sale of the forfeited and other estates and interests in *Ireland*, and by a land tax in *England*, for the several purposes therein mentioned."

That the plaintiff also gave in evidence, a claim duly made and exhibited by *Patrick Magawley*, deceased, and the defendant *Jane Magawley*, then his wife, before the trustees named in the last mentioned act; by which claim, the said *Patrick* and *Jane Magawley*, in right of the said *Jane*, claimed a moiety of the lands of the said *Thomas Leicester*, and the interest thereof.

That the plaintiff also produced and gave in evidence, a decree of disallowance and dismissal of the said claim; made by the said trustees upon hearing the same.

That the plaintiff also gave in evidence another act of Parliament, made at *Westminster*, 1 *Annæ*, entitled, "An act for advancing the sale of the forfeited estates in *Ireland*, and for vesting such as remain unsold by the present trustees, in her Majesty, her heirs and successors, for such uses as the same were before vested in the said trustees; and for the more effectual selling and setting the said estates to protestants, and for explaining several acts relating to the Lord *Bophin* and Sir *Edward Everard*;" and also another act, made at *Westminster*, 2 *Annæ*, entitled, "An act to enlarge the time for the purchasers of the forfeited estates in *Ireland* to make the payments of their purchase money."

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That the plaintiff proved by witnesses, that the said *Thomas Leicester* was a papist at the time of his death: And thereupon the defendant's council objected, that it was not found by the inquisition, that the said *Thomas Leicester*, at the time of his death, was a papist; and that the plaintiff ought not to be admitted to give parol evidence of that matter*.

That the plaintiff also proved and gave in evidence on the trial, the before mentioned indenture of bargain and sale inrolled, dated the 19th of *June*, 1703, from the Commissioners of the forfeited estates in *Ireland*, to the Sword-blade Company in *England*, of the lands in question; and that the Company paid the consideration money in the said indenture mentioned, into the Exchequer in *Ireland*.

This bill of exceptions was several times argued before the Barons in the Court of Exchequer; but, before final judgment was given, the defendant *Luke Nugent* died: At length, in *Hilary* term, 1722, the Lord Chief Baron *Gilbert* and the rest of the Barons gave judgment unanimously for the plaintiff, against the defendant *Jane Magawley*, and 76*l.* 6*s.* 8*d.* costs.

The defendant thereupon brought a writ of error in the Exchequer Chamber of *Ireland*; and, after several arguments, the Court, in *Easter* term, 1725, reversed the judgment so given for the plaintiff.

P. Yorke.

T. Lutwyche.

Vide vol. I.
P. 372.

But to reverse this judgment of reversal, the plaintiff brought a writ of error in Parliament; and on his behalf it was insisted, that as to the first exception contained in the bill of exceptions, the Barons of the Exchequer acted rightly, in permitting the inquisition to be given in evidence, notwithstanding the commission for taking the same was not produced: For this commission being proved to be lost, the best evidence ought, by law, to be received, which the matter was capable of; and no better evidence could, under these circumstances, be possibly given, than the recital of it in the inquisition, which appeared to be filed of record in the Court of Chancery of *Ireland*, and proof *viva voce*, that such a commission was actually issued

* No inquisition, prior to the act 9 *Will.* III. finds the religion of the rebel, dying, or being slain in rebellion.

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under the Great Seal, by virtue whereof the said inquisition was taken; all which the plaintiff proved upon the trial of the cause, and so it was stated at large in the bill of exceptions. And as to the second exception, the opinion of the Barons was apprehended to be also right, in admitting the plaintiff to give evidence, by witnesses examined *viva voce*, that *Thomas Leiceſter* during his life, and at the time he died in rebellion, was a papist: For the act of 9 *Will. III.* on which this point depends, does not make it necessary to be found by any inquisition, before the making of that act, as this inquisition was, that the person dying, or being slain in actual rebellion, was a papist; but only makes *the being papists, or reputed papists*, a part of the description of the persons attainted by that act; and who were likewise to have this further circumstance attending them, that they should be found by inquisition to have died, or been slain in actual rebellion, before the 3d day of *October*, 1691. And that this was the meaning of the law was evident, inasmuch as not one of those inquisitions, which were taken and returned before that act was made, and which the legislature then had under their consideration, found of what religion the traitor was; but it was thought sufficient to find, that he died in actual rebellion. Lastly, it was submitted, whether the giving way to exceptions so slightly founded, as those made by the defendant in the present case, might not tend to overthrow, or render precarious, the purchases made under the faith of the act of Parliament, for sale of the forfeited estates in *Ireland*, for which the public had already received the consideration money: And if so, it was hoped that the judgment of the Barons of the Exchequer would be affirmed.

On the other side it was contended, that an inquisition so obliterated, ought not to have been admitted as evidence, or read to the jury, until the commission therein mentioned was first produced: That this inquisition was apparently defective, several material parts of it being illegible, or wholly wanting; and it appearing upon the face of it, not to be warranted by the commission therein recited. That these defects and imperfections of the inquisition, could not be supplied by any testimony *viva voce*; for no parol evidence ought to have been admitted, to prove the issuing of the commission, by virtue whereof the said inquisition was supposed to have been taken; that commission, if any such there was, being a record to be proved by

N. Fazakerley.

T. Bootle.

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itself only, and of so high a nature as not to admit of any extrinsic proof. That no *viva voce* testimony ought to have been admitted to prove, that the said *Thomas Leiceſter* was a papist, or a reputed papist, at the time of his death, in order to supply the defect of the inquisition in that behalf; it being altogether unprecedented, that on such supplemental *oral* proof, an attainder should suddenly start up, where none before appeared upon record. And lastly, that the said other inquisition and commission were quite foreign to the matter in issue, and therefore ought not to have been given in evidence upon the trial: For all which reasons, it was humbly insisted, that the judgment given by the Barons of the Exchequer was manifestly erroneous; and consequently, that the judgment of reversal given in the Exchequer Chamber was warranted by the rules of law, and ought to be affirmed.

JUDGMENT
reversed.
Jour. vol. 23.
p. 32.

BUT after hearing counsel on this writ of error, it was ORDERED and ADJUDGED, that the judgment of reversal given in the Exchequer Chamber should be reversed; and that the judgment of the Barons of the Court of Exchequer, should be affirmed.

Case 30. The Right Honourable *Bridget, Vis-* } Appellant.
countess Dowager *Fauconberg*, - }
Thomas Evans, - - - Respondent.

11th February, 1726.

THE appellant having applied to the respondent to take a house of his, which about two years before was newly built, situate in *New Bond Street*, and having viewed the same, and agreed to take it; by articles dated the 10th of *June*, 1723, the appellant agreed to accept a lease of the said house for seven years, from *Michaelmas* then next, at the rent of 160*l.* per ann.

Afterwards the respondent, by indenture dated the 27th of *September*, 1723, demised the said house to the appellant, together

ther with some furniture, household stuff, pictures and other things mentioned in a schedule annexed, for seven years, commencing from the feast day of *St. Michael* the Archangel, then next ensuing, under the rent of 160*l.* *per ann.* payable quarterly; and by virtue of this lease, the appellant entered and enjoyed.

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The appellant afterwards, by deed under her hand and seal, dated the 23d of *October*, 1723, agreed to pay the respondent 22*l.* 10*s.* *per ann.* for seven years, for the use of other furniture provided by him for her, and used in the same house. — And having soon after occasion for more furniture for the house, the appellant, by another deed under her hand and seal, dated the 12th of *November*, 1723, agreed to pay to the respondent 17*l.* 10*s.* *per ann.* for seven years, for other furniture which was also provided by the respondent, and used in the said house by the appellant.

But in *Hilary* term, 1724, the appellant exhibited her bill in the Court of Chancery against the respondent, praying that she might be discharged from the said articles, lease and agreements, and that the lease and counterpart thereof, might be delivered up and cancelled; under pretence that the house was not substantially built, and that it was hazardous for the appellant to live therein in windy weather.

To this bill the respondent put in his answer, and insisted, that the house was strong and substantially built; and that the articles, agreements and counterpart of the lease, were fairly and deliberately entered into, without any manner of fraud or imposition whatsoever.

The cause being at issue, divers master builders, bricklayers, and carpenters, were examined as witnesses on the part of the respondent, who proved that the house was substantially built, and with good and sound materials; and on the 29th of *June*, 1725, the cause was heard before the Master of the Rolls; when his Honour was about to dismiss the bill, but at the request of the appellant, was pleased to order that the parties should proceed to a trial at law, the sittings after the then next term, in the Court of Kings Bench, on this issue, *viz.* Whether the house in question was built in a substantial manner, fit for a tenant

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tenant to live in: And the jury, who were to try the issue, were directed to have a view; and after the tryal had, either party was at liberty to resort back to the Court, on the equity reserved.

Accordingly, on the 3d of *December* following, the issue was tried before the Lord Chief Justice *Raymond*; when the jury, after a long examination of many witnesses, brought in their verdict for the defendant, that the said house was built in a substantial manner, fit for a tenant to live in.

The appellant afterwards applied to the Lord Chancellor for a new trial, who directed her to move the Court of King's Bench for such trial; which was accordingly done in *Hilary* term, 1725, but the Court refused to grant any new trial, being satisfied with the verdict.

On the 21st of *February* following, the cause came on to be heard upon the equity reserved, before the Master of the Rolls; who upon debate of the matter by counsel on each side, and hearing the order read, which was made upon the former hearing, and also the *postea* or verdict; was pleased to order that the appellant's bill should stand absolutely dismissed with costs, both at law and in the Court of Chancery.

The appellant being dissatisfied with this decree, preferred her petition and appeal to the Lord Chancellor *King*; and the cause being reheard before his Lordship on the 30th of *April*, 1726, he was pleased to dismiss the petition of appeal, and to affirm the decree.

P. Yorke.

N. Fazakerley.

The appellant therefore appealed from both decrees, contending, that it appeared by the proofs in the cause, before the first hearing, that the respondent had very much imposed upon the appellant, in assuring her, that the house was substantially and completely built and finished; whereas it was so slightly and unskilfully built, that it was not likely to stand to the end of the appellant's lease, nor could she dwell therein without the hazard of her life, as well as the lives of the rest of her family; and therefore no issue ought to have been directed, but the appellant ought to have been relieved on the hearing, by having the lease and counterpart delivered up, and decreeing the respondent to pay her costs. But if it had been necessary for the information of the Court, to have directed such an issue, yet inasmuch

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inasmuch as the strength of the evidence given upon the trial of it, touching the dangerous state and condition of the house, was on the appellant's side, besides the additional affidavits offered by her counsel on the motions for a new trial, and the great reason to believe that the jury were influenced; the appellant ought not to be concluded by the verdict, but a new trial should have been directed by a special jury; and before such new trial had, the appellant's bill ought not to have been dismissed.

On the other side it was said, that the Court of Chancery has constantly used, and has an undoubted right to direct an issue at law, to inform the conscience of that Court in matters of fact, which from the evidence before them, appear doubtful; that in this case, the evidence before the hearing was very strong in favour of the respondent; and that the issue was directed at the earnest intreaty of the appellant's counsel, and was the only thing which prevented his Honour the Master of the Rolls from dismissing the bill. That the issue had been accordingly tried, and found for the respondent to the satisfaction of the Lord Chief Justice who tried it; and upon whose report of that trial, the Court of King's Bench thought proper to refuse a new trial: And as to the allegation that the jury were influenced, it was denied by every one of them, upon oath. It was therefore hoped, that the decree and proceedings of the Court of Chancery, would appear to be founded in justice and equity, and consequently be affirmed; and the appeal dismissed with costs.

C. Talbot.

T. Lutwyche.

At the hearing of this appeal, it was proposed on the part of the appellant, to read certain affidavits of persons skilled in building, touching the house in question, which were offered to the Master of the Rolls, on applying for leave to move for a new trial; but this being objected to on the part of the respondent, the counsel were directed to withdraw; and after debate, the question was put, "Whether the said affidavits should be read," and resolved in the affirmative. The affidavits were accordingly read, and after hearing counsel on both sides, it was ORDERED and ADJUDGED, that the appeal should be dismissed; and the decree and affirmance thereof therein complained of, affirmed.

DECREES
affirmed.
Jour. vol. 23.
P. 34.

Case 31. *John Floyer, Esq;* - - - Appellant.
Richard Johnson, Esq; - - - Respondent.

16th February, 1726,

Viner, vol. 21.
 p. 488. note 10
 ca. 5.

THE appellant, by contract in writing dated the 30th of September, 1720, agreed to purchase of the respondent two leasehold estates in the county of *Surry*, at sixteen years purchase, being beneficial leases for 21 years, usually renewed every seven years: And one of the leases being held under the Hospital at *Croydon*, was to be renewed by the respondent, and made up a term of 19 years at least.

After executing this contract, the appellant made several offers and proposals to the respondent by letter and otherwise, in order to settle and adjust the annual value of the premises, which was to be the measure of the purchase, amicably between themselves, and wherein the appellant would have yielded almost to any terms to prevent a suit; but the respondent knowing the appellant had little or no experience in country affairs, and hoping by that means to make an advantage, always declined closing with any proposals the appellant made, and was still adding, or insisting on something more, with design to work up the appellant to give an exorbitant price for the premises.

In this manner near two years were spent, and the appellant finding no hopes of an accommodation, he in *Hilary* term, 1722, filed his bill in the Court of Exchequer against the respondent, for a specific performance of the contract at 16 years purchase, according to the real annual value of the premises: The respondent by his answer insisted, that he and the appellant had come to an agreement together, to settle and adjust the value of the premises at 180*l.* *per ann.* and therefore relied upon it, that the purchase ought to be made and computed according to that valuation: And further insisted, that having at the appellant's request, renewed the Hospital lease for 21 years, whereas by the contract he was obliged to renew only for 19; he had paid 16*l.* extraordinary in his fine on that account, which the appellant ought to allow.

In *Michaelmas* term, 1723, the respondent thought proper to file his cross bill against the appellant, to oblige him to go on with his purchase at 16 years value, after the rate of 180*l.* *per ann.* upon the appellant's supposed agreement to estimate the premises at that rate; and likewise demanded an allowance of 16*l.* for the appellant's share of the fine, for the two years extraordinary in the Hospital lease; suggesting, that the appellant promised and agreed to pay the same.

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The appellant by his answer to this cross bill, denied he ever agreed to value, or accept the premises at 180*l.* *per ann.* or at any other certain rate whatsoever; but admitted, he had made several overtures and proposals to the respondent about settling the annual value of the premises amicably between themselves, but which the respondent would never close or agree with: And as to the demand of 16*l.* for his share of the fine for renewing the Hospital lease, the appellant denied he ever agreed to pay any certain sum; but admitted he did agree to allow a proportion of the fine for the two additional years, which he was ready and submitted to pay.

On the 8th of *June*, 1724, both causes were heard; when it was ordered and decreed, that the contract of the 30th of *September*, 1720, for the purchase of the premises at 16 years value, should be performed; and in regard it did not appear to the Court, that the annual value of the premises was ever settled or agreed betwixt the parties; it was ordered, that it should be referred to the Deputy Remembrancer, to consider and adjust the annual value of the premises; and according to that rate, discounting all proper allowances, to compute and ascertain what the *quantum* of the purchase money did amount to, and to compute interest thereon, after the rate of 5*l.* *per cent. per ann.* from *Lady-day* 1721, the time when the contract ought to have been performed, discounting what should appear to have been paid in part, or on account of the said purchase; and to see what proportion of the fine the appellant ought to pay and allow, for renewing the Hospital lease, which was to be added to the purchase money. And the Deputy was also to take an account of the rents and profits of the premises made or received by the respondent, or which, without his wilful default, might have been made or received by him from *Lady-day* 1721, which were to be allowed the appellant out of his purchase

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purchase money; and the consideration of costs, and all further directions, were reserved until after the Deputy should make his report.

Pursuant to this decree, the Deputy made his report, by consent of parties, dated the 29th of *April*, 1725, and therein stated the proofs on both sides, as to the annual value of the premises; but certified, that by reason of the contrariety in the evidence, he had not been able to settle the value, and therefore had not proceeded to take the accounts directed by the decree.

On the 3d of *May* following, the causes were heard upon the special matter of this report; when the Court directed an issue to be tried at the next assizes for the county of *Surry*, to try what was the yearly value of the premises in question, at *Lady-day*, 1721, when the contract for the purchase should have been performed: And it was further ordered, that the Sheriff should return a good jury, who were to have a view; and that after the trial, the causes should come on again for the final directions of the Court.

Accordingly this issue was tried before Mr. Justice *Dormer*, and ten of the jury had been upon the view; and after a long examination of witnesses, the jury found a verdict to the satisfaction of the Judge, that the yearly value of the premises in question, at *Lady-day*, 1721, was 130*l. per ann.*

On the 8th of *December*, 1725, the causes came on upon the equity reserved, when the respondent moved for a new trial, and upon reading some passages in the original bill, and in the appellant's answer to the cross bill, and two letters written by the appellant to the respondent, from whence it appeared, that the appellant himself had estimated the premises at a greater yearly value than was found by the jury; the Court was pleased to order, that a new trial of the issue should be had, upon the respondent's paying the costs of the former trial, to be taxed by the Deputy; and that the former verdict should stand, but should not be given in evidence upon the new trial.

P. Yorke.

F. Ward.

But from this order the appellant appealed, because it was not founded upon any certificate of the Judge who tried the issue, nor upon any affidavit or suggestion of any corruption or misbehaviour either in the jury, or the appellant or his agents. And

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And it was contended, that the expressions in the appellant's bill, answer and letters, upon which only it appeared that the new trial was directed, were no evidence in law, to prove or ascertain the annual value of the premises in question; or if they were, yet they were such evidence as arose long before the trial was had, and such as being always in the respondent's own power, he might have produced at the trial, if he had thought fit. That if a trial so fairly and impartially had, and which was admitted to be well and properly directed, was not to determine the question between the parties, as to the yearly value of the premises, it was scarce possible to conceive what trial should; and for the Court to enter into the consideration of the quantum of such yearly value, after they had directed it to be tried by a jury, and it had been tried accordingly, was in effect, to set aside their own direction and decree, or at least to make it vain and nugatory. And, that the setting aside a trial at law so solemnly had, without consulting the Judge who presided at such trial, and without the least charge or imputation of partiality or corruption in the jury, or parties; would tend very much to weaken and overturn that excellent part of the common law, trials by juries, and to create endless expence and vexation to suitors. It was therefore hoped, that the said order of the 8th of *December*, 1725, would be reversed and discharged; and inasmuch as the causes then stood for the final directions of the Court upon the equity reserved, that their Lordships would be pleased to make such order and decree, as the Court of Exchequer ought then to have made; namely, to order that the Deputy Remembrancer should compute the purchase money to be paid by the appellant, according to the annual value of the premises, as found by the last verdict, and carry on the account of interest and profits, pursuant to the decree of the 8th of *June*, 1724: That upon the appellant's payment or tender of the purchase money, as it should be settled by the Deputy, the respondent should execute an assignment of the leases and premises in question to the appellant, or to whom he should direct, with the approbation of the Deputy, and at such time and place as he should appoint: That the respondent should procure all proper parties to join therein, and should forthwith bring before and leave with the Deputy, the original leases, and all other deeds and writings relating to the premises: That the respondent's cross bill should be dismissed with costs,

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and that the appellant should have his costs, both at law and in equity, to be taxed by the Deputy, and allowed and deducted to him out of his purchase money.

T. Lutwyche.

C. Talbot.

On the other side it was insisted, that from the appellant's bill, answer and letters, and all the proceedings in the causes, it manifestly appeared, that the yearly value of the lands, at 130*l.* as found by the jury, could not be the full and real value; and therefore a new trial was properly directed. That in case the value of the lands should remain fixed at 130*l.* per ann. which it would be, without a new trial, the appellant would become a purchaser of those lands for 1080*l.* in 1720, when lands sold very high, which cost the respondent, with the appellant's privity, 1600*l.* in the year 1716, when lands sold much cheaper, and which likewise cost him 110*l.* for a renewal fine, and several considerable sums in improvements. It was therefore hoped, that the order would be affirmed, and the appeal dismissed with costs.

ORDER
reversed
in part.
Jour. vol. 23.
P. 39.

BUT, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that so much of the said order as prohibited the former verdict being given in evidence at the new trial, should be reversed: And it was ORDERED and declared, that the appellant should be at liberty to give the former verdict in evidence at the new trial: And it was further ORDERED, that a view of the premises in question should be had, as directed at the former trial.

Case 32. *Richard Maguire,*

Appellant.

Richard Maddin,

Respondent.

17th February, 1726.

Viner, vol. 6.
p 366. ca. 19.
2 Eq. ca. ab.
241. ca. 26.

THE appellant, in the month of *April*, 1716, put several goods and merchandize, to the value of 2000*l.* sterling, on board a ship of his, called the *King David*, then lying at the port of *Dublin*, to be sent to, and sold at the *Madeiras* and other *Spanish* islands; and, at the request of the respondent, employed

employed *John Maddin*, the respondent's son, a young man under the age of 21, to be his Supercargo and Factor, upon the respondent's engagement, by a note under his hand, that his said son should discharge his trust faithfully and honestly.

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The appellant accordingly, on the 5th of *April*, 1716, gave instructions in writing to the said *John Maddin*, for his conduct and behaviour in the said trust; and therein, among other things, ordered him to sell his whole cargo for ready money, and to bring home with him such ready money as he should receive; and if he could not sell all the said goods for ready money, and the wines of that season should not be good, that he should barter such of the goods as should remain unsold, for the best *Malmsey* and *Palm* wines of the next season, and bring them with him; and gave him directions how he should dispose of them at his return.

In a few days afterwards, the ship sailed from *Dublin*, and on the 17th of *May* following arrived at *Fyall*, where the said *John Maddin* sold part of the goods for about 75*l.* sterling, in ready money; and the rest he bartered with one *Thomas Maguire* at port *Oratavia*, in the island of *Teneriffe*; and agreed with him, that he should give of the best *Malmsey* wines, the full value of the cargo at a price to be agreed on, and if the price of wines should not be broke at the time that *Maddin* was to embark them, then the price was to be settled by persons to be named by him and the said *Thomas Maguire*; these wines were to be shipped as early in the month of *December*, as any ship there should be loaded; and as many of them were to be put on board the ship *King David* as she could carry, and the rest were to be sent, according to the orders of *Maddin*, or the appellant.

This agreement with *Maguire* was made on the 22d of *August*, 1716; and on the 30th or 31st of that month, *Maddin* caused the Master of the ship to set sail, and he himself came away with her empty to *Dublin*; having left all the appellant's effects behind him, and particularly the ready money, for which he had sold some part of the goods; without waiting for, or so much as settling the price of the new wines, contrary to his said instructions, and also to the directions given by the appellant to one *Owens*, who went with him, and whose instructions he often saw.

In

1726.

In consequence of this conduct, the appellant was forced to send another ship on purpose to *Teneriffe*, to bring home the said wines and money; and was at a new expence of insurance for her, though he had before insured the *King David*, and was likewise at the charge of sending another Supercargo; by which, and by the loss of an early market, the appellant sustained damages to the value of more than 400*l.* sterling.

The appellant therefore, in *Hilary* term, 1717, brought his action on the case against the respondent, in the Court of King's Bench in *Ireland*; and assigned for breaches of trust in the said *John Maddin*, his not bringing home the appellant's ready money, for which he had sold part of the cargo, and his bringing home the said ship empty. But the respondent, instead of pleading at law, where alone the matter ought to have been determined, filed a bill against the appellant in the Court of Chancery in *Ireland*; and having therein set forth the agreement to make his son Supercargo to the said ship, and his own note for his said son's faithful discharge of the trust; and pretending, that he must examine witnesses in the said island of *Teneriffe*, he prayed to be relieved in equity; and obtained an injunction for want of the appellant's answer, which was afterwards ordered to continue, till the hearing of the cause.

The appellant having answered, and issue being joined and witnesses examined, (the respondent having not examined one witness beyond seas, tho' the only equity in his bill was, that he could not go to a trial at law, without examining witnesses abroad) the cause was heard on the 10th of *July*, 1723; when, upon opening the bill and answer, and without reading any proof on either side, the Lord Chancellor was pleased to decree, that the depositions of such witnesses taken in the cause, as by reason of death, or any other lawful cause, to be made appear by affidavit, could not be present on a trial at law, should be made use of, and given in evidence for the plaintiff or the defendant, on any trial at law; and his Lordship reserved the consideration of costs, till after the trial; and ordered the bill to be retained accordingly.

After this decree, the respondent put in a long special plea to the appellant's declaration; but which not containing any defence against the appellant's demand, he demurred to it; and the

the respondent having joined in demurrer, the same was argued, and judgment given for the appellant. Whereupon a writ of inquiry was awarded, and, by order of the Court of King's Bench, was executed in the presence of one of the Judges of that Court: And upon the execution thereof, the appellant fully proved, that by reason of the said *John Maddin's* bringing away the ship without her cargo, the appellant sustained more than 200*l.* damages in the freight of the ship, which he sent to bring home the wines that *Maddin* should have brought with him, and in the charges of insurance, and a Supercargo; and 200*l.* more by reason of the loss of the early market, which the King *David* would have come to, if *Maddin* had stayed for and received the new wines, according to his agreement with *Maguire*; notwithstanding which evidence, and altho' the Judge, who was present, delivered his opinion, that the appellant was damnified in the aforesaid particulars, the jury found for the appellant only six pence costs, and six pence damages.

1726.

On the 23d of *January*, 1725, the appellant, by his counsel, moved the Lord Chancellor, that the respondent's bill might be dismissed, and that the appellant might have his costs, and be at liberty to enter up his judgment, and take out execution at law, on the return of the writ of inquiry; but his Lordship was pleased to say, that he would have the said cause set down in the paper of causes; which being accordingly done, the same was heard on the 4th of *February* following, when his Lordship, on reading only the writ of inquiry and the return, and without reading any of the proofs in the cause, was pleased to grant the respondent a perpetual injunction, and to order the appellant to pay him his costs, both at law and in equity.

The appellant therefore, appealed from this decree; insisting, that his case being properly triable at law, he ought not to have been hindered for near six years from proceeding in his action, by the injunction of the Court of Chancery: And when the appellant had obtained a judgment, by which it was declared, that he had a right, and ought to recover damages; the appellant, however small the damages given by the jury, ought not to have been hindered from entering up his final judgment, and taking out execution thereon; but, as the whole matter was properly determinable at law, and accordingly so determined, and

T. Lutwyche.

W. Hamilton.

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P. Yorke.

C. Talbot.

and as no fault or fraud was found in the appellant, the bill against him ought to have been dismissed with costs.

On the other side it was argued, that there was no ground or foundation for the appellant's action at law against the respondent; because it manifestly appeared, that the appellant had saved considerably by *John Maddin's* careful and prudent management. That if judgment had not been obtained upon the demurrer, and if the action had been regularly tried by a jury, the appellant could have recovered nothing; and in that case, the respondent would clearly have been entitled to his costs at law: It was therefore apprehended to be but just and reasonable in the Court of Chancery, to give the respondent his costs at law; and especially, as the consideration of costs was reserved by the decree of that Court, until a trial at law should be had. That the parties were under a necessity of coming into a Court of Equity, not being able to try the action at law, without the testimony of witnesses, who were examined by commission in the cause, and whose evidence could not be had *viva voce* upon the trial; and since it appeared to the Court, that the appellant's proceedings against the respondent from the beginning, were merely frivolous and vexatious, it was hoped, that the ordering the respondent his costs, would appear to be very just; and that therefore the decree would be affirmed, and the appeal dismissed with costs.

DECREE
reversed.
Jour. vol. 23.
p. 40.

BUT, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of should be reversed, and the injunction dissolved: And it was further ORDERED, that the respondent's bill should be dismissed, with costs to be taxed; and that the same, when so taxed, should be paid by the respondent to the appellant.

Edward

Edward Williams, Appellant. Case 33.
 John Bell Lane, Esq; and the Right
 Honourable Mary Viscountess Lane- Respondents.
 borough,

23d February, 1726.

SIR George Lane, in the year 1649, purchased from Thomas Viner, vol. 18.
 Dutton, Esq; son and heir of Sir Thomas Dutton, Knt. the p. 285. ca. 5.
 manor and lands of Rathcline, and other lands in the county of 2 Eq. ca. ab.
 Longford in Ireland; and being thereof seised and possessed, 491. ca. 1.
 was, in 1650, during his attendance upon King Charles II. in
 foreign parts, ousted and dispossessed of the said manor and lands,
 by means of the then rebellion in that kingdom; and continued
 so dispossessed until the year 1660.

On the restoration of the King, and in the twelfth year of
 his reign, annoq; Domini 1660, an act passed in the Parliament of
 England, wherein it was enacted, " That the said Sir George
 " Lane, his heirs, trustees and assigns, should have, hold and
 " enjoy, and should be, and was thereby adjudged to be in
 " such actual seisin and possession of the said manors of Rath-
 " cline and Lisduffe, with their appurtenances, as he was in
 " on the 15th day of September, 1650; and should and might
 " enjoy all other the lands, tenements and hereditaments,
 " wherein the said Sir George Lane had any estate in possession,
 " reversion or remainder, on the said 15th day of September,
 " 1650, in as large, ample and beneficial manner, to all intents
 " and purposes, as he the said Sir George Lane, or any other
 " person or persons in trust for him, or to his use, had held or
 " enjoyed, or of right ought to have held or enjoyed the same;
 " and that all acts, ordinances, orders, attainders, records and other
 " matters and things whatsoever had, made, transacted or done,
 " to the prejudice of him the said Sir George Lane, since the
 " said 15th day of September, 1650, should be, as against the
 " said Sir George Lane, his heirs and assigns, void and null to
 " all intents and purposes, as if the same never had been."

By

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By an act of Parliament, passed in *Ireland* in the 14th year of King *Charles II.* commonly called the act of *settlement*, it was enacted, “ That it should and might be lawful to and
 “ for Sir *George Lane*, Knt. his heirs and assigns, to have,
 “ hold, possess, and quietly enjoy, to the use of him the said
 “ Sir *George Lane*, his heirs and assigns, all the lands, tenements and hereditaments, wherein the said Sir *George Lane*
 “ had any estate in possession, reversion or remainder, on the
 “ 15th day of *September*, 1650; and also all the castles, manors,
 “ lands, tenements and hereditaments, which he the said Sir
 “ *George Lane*, or any other persons in trust for him, or to his
 “ use, had purchased of, or from *Thomas Dutton*, Esq; son and
 “ heir of Sir *Thomas Dutton*, Knt. deceased; and also of and
 “ from Sir *John Norton* of *Rotherfield*, in the county of *South-*
 “ *ampton*, Bart. situate, lying and being in the counties of
 “ *Longford* and *Leitrim*, containing, by estimation, 2600 acres
 “ of profitable land, be it more or less. Saving unto all and
 “ every person and persons, bodies politic and corporate, their
 “ heirs, executors, successors and assigns, (other than to the
 “ King’s Majesty, his heirs and successors, and other than to
 “ the said *Thomas Dutton* and Sir *John Norton*, or any of them,
 “ or the heirs, executors, administrators or assigns of them, or
 “ any of them; and other than such person and persons, their
 “ heirs, executors or assigns, as did or might claim, to the use
 “ of, or in trust for them, or any of them; and other than to
 “ such person and persons, their heirs, executors and assigns,
 “ who should not be adjudged innocent, according to the
 “ qualifications of that act) all such estate, right, title and
 “ interest, either in law or equity, as they or any of them had,
 “ before the making of the said act.”

And in another act of Parliament, passed in *Ireland* in the 17th year of his said Majesty’s reign, commonly called the act of *explanation*, is contained a clause, enacting, “ That Sir *George*
 “ *Lane*, and several other persons therein named, and all others
 “ particularly provided for in the said former act, and not
 “ particularly mentioned in this act and other special provisions made for them, their heirs, executors and assigns,
 “ should hold and enjoy to them, their heirs and assigns, all
 “ and singular the lands, tenements and hereditaments, in and
 “ by the said former act settled, granted, disposed and confirmed, or mentioned, meant, or intended to be settled,
 “ granted

“ granted, disposed and confirmed to them, their heirs and
 “ assigns, and not already decreed away by such decrees as were
 “ hereby confirmed; and all other the benefits and advantages
 “ of this act, and the benefits and advantages in and by the
 “ said former act, mentioned in any particular clause, or other
 “ proviso relating to them, or any of them, their heirs or
 “ assigns; the benefit of reprisals, by the said former act granted,
 “ only excepted.”

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In pursuance of these several acts, Sir *George Lane*, on the 19th of *February*, 18 *Caroli* II. exhibited his claim to the said manor and lands, before the Commissioners appointed for putting the said acts in execution; and on the 10th of *March* following, that claim was heard before the said Commissioners; and it then appearing, that the said lands were seised and sequestered in the time of the then late rebellion in *Ireland*, and thereby forfeited and vested in his said Majesty, to the uses in the said several acts mentioned; the Commissioners thereupon decreed, that the said Sir *George Lane* was lawfully entitled unto the same, to him and his heirs for ever, in free common soccage; subject to a quit-rent of 29*l.* 3*s.* 4*d.* per ann. payable into the Exchequer in *Dublin*.—And, on the 26th of *May* following, the Commissioners certified this judgment under their hands and seals; whereupon the premisses were granted and confirmed to the said Sir *George Lane*, his heirs and assigns for ever, by letters patent, bearing date the 18th of *July*, 18 *Caroli* II.

Sir *George Lane* being so seised, by indentures of lease and release, dated the 3d and 4th of *May*, 1676, in consideration of the marriage of his son *James* with *Mary Compton*, and of 2000*l.* to him paid, settled the said manor and lands of *Rathcline* on trustees, to the use of himself for life; remainder to his said Son *James* for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of that marriage in tail male, with remainders over.

On the 13th of *December*, 1683, Sir *George Lane*, having first been created Lord Viscount *Lanesborough*, died; upon whose death, his said son *James*, then Lord Viscount *Lanesborough*, being heir at law of his father, and also a purchaser under his own marriage settlement, took possession of the said manor and lands of *Rathcline*, which his father had enjoyed to the time of his

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his death, and received the rents and profits thereof, without molestation, for upwards of thirty years.

But, on the 3d of *July*, 1718, the appellant filed his bill in the Court of Chancery in *Ireland* against Lord *James*, pretending himself to be heir at law of Sir *Thomas Dutton*, and as such, entitled to the manor and lands of *Rathcline*, and also to the lands in the county of *Leitrim*; and therefore prayed a discovery of the purchase deeds, and that Lord *James* might account for the rents and profits of all the said lands, and deliver up to him the possession thereof.

To this bill, Lord *James* put in a plea and answer; and pleaded in bar to the appellant's claim, the said marriage settlement, marriage, and the portion paid, without notice of any of the matters in the appellant's bill; that Sir *George Lane*, about the 13th of *December*, 1683, died seised and possessed of the premises; and thereupon Lord *James* entered into possession, and had enjoyed the same ever since; that Sir *George Lane* was, on the 15th of *September*, 1650, in possession, and then ousted, and so continued until 1660: He also pleaded the three several acts of Parliament, decree, certificate and letters patent before stated; and by his answer said, he believed that the 2000 *l.* marriage portion was paid to his father; and that he, Lord *James*, never was in the possession, or received the rents or profits of the lands in the county of *Leitrim*.

This plea being argued on the 14th of *November*, 1719, before the then Lord Chancellor of *Ireland*, the same was allowed; and thereupon the appellant replied, and witnesses having been examined on both sides, the cause was heard on the 15th of *February*, 1722, before the Commissioners for the custody of the Great Seal of *Ireland*; when the appellant's claim appearing vexatious, the Court ordered his bill to be dismissed; and in case he gave any further trouble, to pay the costs of the suit.

But the appellant, notwithstanding this decree, procured the cause to be reheard on the 19th of *July*, 1723, before the then Lord Chancellor, who was pleased to order and adjudge, that the said former order should be affirmed.

The appellant being still dissatisfied, applied for and obtained a further hearing, on the 7th of *May*, 1724, when offering to read other evidence and proofs than what had been either read, or offered to be read on the former hearing and rehearing; the Court declared, they could see no reason to permit such proofs to be read on this further hearing, and therefore refused the same.

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Soon afterwards, the said *James* Lord Viscount *Lanesborough* died; but before his death he made his will, dated the 15th of *October*, 1722, and thereby devised to the Lord Bishop of *Bath and Wells*, *Hatton Compton*, *Robert Dormer*, and *James Middleton*, Esqrs; *inter alia*, the said manor of *Rathcline*; in trust to permit the respondent *Mary*, Viscountess *Lanesborough*, to receive the rents and profits thereof during her life; and the testator thereby declared his will to be, that his trustees should, with all convenient speed, after the decease of the respondent *Mary*, Viscountess *Lanesborough*, convey, settle and assure the said premises to the use of the respondent *John Bell Lane*, for life; remainder to his first and other sons in tail male; remainder to *George Fox Lane*, Esqr; for life, with several remainders over.

After Lord *James's* death, the appellant thought proper to appeal from all these several orders; and on his behalf it was contended, that the marriage settlement pleaded by the late Lord *Lanesborough* ought, as to him and the respondent *Lane*, his heir and devisee, to be considered as a voluntary settlement, the lands in question being no part of the Lady's jointure; and it not appearing, that Sir *George Lane*, from whom the estate moved, received any part of her portion, so that there was no reason to consider Lord *James* as a purchaser for a valuable consideration: Besides, his saying that he *believed* the portion was paid to his father, was not sufficient in this case; for he being the husband, was entitled to the portion, and whether it was paid to his father, or himself, was a matter lying within his own knowledge; the averment of payment ought therefore in a plea of this nature, to have been positive; it being very different from the case of a purchase made by an ancestor, where it may be sufficient for the defendant to say, he believes and hopes to prove, that the consideration money was paid by the ancestor. That from the several acts of Parliament pleaded by Lord *James*,

P. Yorke.

J. Willes.

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it appeared, that his father neither had, or could have the least right to any of the lands in question, but such as he had purchased from *Thomas Dutton* and *Sir John Norton*, which of itself was sufficient notice; and it became incumbent on Lord *James*, and his Lady's friends, to have enquired what estate or interest *Sir George Lane* had purchased from *Dutton* and *Norton*, which if they had done, it would have appeared, that he had only bought a redeemable, or defeazable estate. Since therefore the acts so pleaded, gave *Sir George Lane* a title only to the lands by him purchased from the said *Thomas Dutton* and *Sir John Norton*, without mentioning any lands in particular; and since Lord *James* had not proved, or even in his plea averred, that the lands in question were comprised in such purchase; the appellant was well entitled to a discovery of the purchase deeds, and of all the lands and denominations comprised therein; and if so, the plea ought not to have been allowed, nor the appellant's bill dismissed. That *Sir Thomas Dutton* and his sons, and also the appellant and his mother were protestants, and no ways forfeiting persons, consequently not affected by the vesting clauses in the acts of *settlement and explanation*; and it appearing, that *Sir George Lane* had only an incumbrance on the lands in question, and came first into the possession thereof, under a lease made by *Sir Thomas Dutton*, he ought not in equity, to be allowed any greater benefit of his grant or patent, than to protect his incumbrance thereby; and after satisfaction of such incumbrance, and the expiration of the lease, that grant or patent ought to be considered as taken in trust for the heirs of *Sir Thomas Dutton*. That the length of time was sufficiently accounted for by continual claims, and well excused by infancy, coverture and such like disabilities in the intervals; and for a considerable space, was well answered by the said old lease. And lastly, that the Court of Chancery ought to have permitted the appellant to prove his exhibits, *viva voce*, and to enter his proofs as read; that he might have been the better able to lay open his case and proofs fully upon this appeal. It was therefore hoped, that the said several decrees or orders would be reversed, and the plea over-ruled; so that the appellant might be at liberty to seek for a full discovery and relief against the respondent *Lane* the devisee, who was now come into the estate as a meer volunteer.

On the other side it was only said, that if the appellant was regular in his appeal, yet for the several reasons contained in Lord *James's* plea, the respondents conceived, that the several orders appealed from were equitable and just, and ought therefore to be affirmed.

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C. Talbot.
T. Lutwyche.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the several orders or decrees therein complained of, affirmed.

DECREES
affirmed.
Jour. vol. 23.
P. 47.

Arthur Squire, - - - Appellant. Case 34.
Dame Rachel Pershall, Widow, - Respondent.

24th February, 1726.

JOHN Metcalfe, Esq; having one son, *John*, and two daughters, namely, the respondent and *Isabella*, and being seised in fee of an estate at *Leeds*, in the county of *York*; made his will, in *September*, 1670, and thereby devised all his estate, both real and personal, either in possession or reversion, to *Eleanor* his wife, to dispose of at her will and pleasure; out of which she was give portions to his son *John*, and to his youngest daughter *Isabella*, as she thought fit and convenient, and made his said wife sole executrix, and soon after died. The said *Eleanor* his widow, entered on the estate and quietly held and enjoyed the same several years. And in 1674, *John* the son died, under age and unmarried.

By indentures of lease and release, dated the 21st and 23d of *January*, 1679, *Eleanor* the widow, for the considerations therein mentioned, conveyed all the said premises to *John Bright*, Esq; and his heirs, whom she soon after married.

Isabella the youngest daughter, afterwards levied a fine of the premises to the said *John Bright*; and by a deed dated the 11th of *November*, 1680, declared the uses of the said fine to the said *John Bright* and his heirs; and he held and enjoyed all the said premises during his life.

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In *February*, 1686, *John Bright* made his will, and thereby gave one moiety of the said estate to his said wife *Eleanor*, and her heirs; and the other moiety to the said *Isabella*, then the widow of *Abel Durden*, during her life, and after her death, to her two daughters *Eleanor* and *Isabella Durden*, and to the heirs of their bodies.

Eleanor enjoyed a moiety of the premises under the will of her husband *Bright*, and soon after his death she married one *Brooks*; who living but a short time, she on the 7th of *February*, 1691, married *Baldwyn Higgons*, but the very day before, viz. the 6th of *February*, 1691, without the privity of Mr. *Higgons*, she conveyed her moiety of the said premises to trustees; reserving a power to herself to dispose thereof, without the consent of any husband she should afterwards marry; and accordingly, by lease and release dated the 18th and 19th of *October*, 1694, she by the name of *Eleanor Brooks*, widow, conveyed the same to trustees and their heirs, upon the several trusts therein mentioned.

Baldwyn Higgons, knowing nothing of the deeds of 1691, and 1694, he and his wife *Eleanor* levied a fine of the said moiety; and by deed dated in *November*, 1698, declared the uses of the said fine to the said *Eleanor*, during her life; and after her death to the said *Baldwyn*, during his life, and to other uses therein specified: In which deed, *Eleanor* reserved a power to herself, by any writing under her hand and seal, to revoke the said uses and declare any other uses. And by her will, under hand and seal, dated in *January*, 1702, she did revoke those uses, and devised her moiety of the said estate to one *Mary Cox*, and her heirs; who by writing under her hand and seal, dated the 21st of *January*, 1702, declared her name was used in the said will, in trust for the said *Baldwyn Higgons* and his heirs; and covenanted, that *Higgons* and his heirs should enjoy the said estate.

In *January*, 1702, *Eleanor Higgons* died, and soon after her death, *Banister*, the surviving trustee in the deed of *October* 1694, entered upon the said moiety, and received the rents and profits thereof for several years, and kept the same from the said *Baldwyn Higgons*; and the other moiety was all along from the death of *John Bright*, and under his will, received by *Isabella Durden* during her life, and after her death by *John Whitton* and *Thomas Harrington*, who married her said two daughters.

Cases in Parliament.

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In *Hilary* term, 1707, *Baldwyn Higgons* brought a bill in Chancery against the said *Banister*, *Whilton* and *Harrington*, to set aside the deed of trust made to *Banister*; and that *Higgons* might have his moiety of the said estate, and an account of the rents received since his wife's death: And upon hearing that cause on the 28th of *February*, 1710, the Court declared there was a fraud apparent in the said deed, and decreed that *Banister* should convey the said moiety to *Higgons* according to the uses of the deed and fine in 1698, and that *Banister* should account before a Master, for what rents he had received for the said moiety since the death of *Eleanor*, and pay the same to *Higgons*. And in consequence of this decree, the Master by his report dated the 27th of *February*, 1711, certified that there was due from *Banister*, for rents received by him out of the said moiety 517*l.* which the Master directed him to pay to *Higgons*. *Banister* accordingly paid him 200*l.* and was to pay him the rest at such future days, as were agreed upon between them.

In *November*, 1712, the respondent exhibited her bill in Chancery, against the said *Baldwyn Higgons*, and Sir *Thomas Pershall* her husband, and thereby claimed one moiety of the said *John Metcalfe's* estate, as one of his daughters and coheirs; suggesting, that her said father was *non compos mentis* at the time of his death, and so not capable of making any will; and that *Eleanor Metcalfe* her mother had no right to the estate, or any power to convey the same to *Bright* and *Higgons*; and therefore prayed, that the said deeds made by her mother, under which *Higgons* claimed a moiety of the said estate, might be set aside.

To this bill *Higgons* put in his answer, and thereby insisted on his title to the said moiety, and on his said decree for the same; and soon after died in possession, before any thing more was done in that cause. — But being indebted to the appellant on a judgment for 500*l.* and in other debts amounting to 200*l.* more, as appeared by an account stated under his hand; he, in *April*, 1713, assigned to the appellant 250*l.* part of the money due from *Banister*, and directed *Banister* to pay the same, towards satisfaction of the said judgment debt.

In *May*, 1713, *Higgons* made his will, and thereby devised the said premises to *Arthur Lake* and *George Took*, and their heirs, in trust to be sold for payment of his debts and legacies, and appointed

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appointed them executors: But *Lake* and *Took* refused to prove the will, or act in the trust; and thereupon one *Catherine Farnham*, widow, a residuary legatee, took out letters of administration to *Higgons*, with his will annexed.

In *Michaelmas* term, 1713, the appellant exhibited his bill in Chancery against the said *Arthur Lake* and *George Took* the trustees, the said *Catherine Farnham*, *Lady Pershall* and *George Banister*, and others; praying to have the estate sold pursuant to the said *Baldwyn Higgons's* will, for payment of his debts and legacies; and that the appellant might be paid his debt when the estate was sold, and might have the money remaining in *Banister's* hands paid to him in part of his said debt.

In *Easter* term, 1717, the respondent brought her bill of revivor and supplement against the said *Catherine Farnham*, *Arthur Lake*, *George Took*, the appellant and others; stating the will of the said *John Metcalfe* her father, and insisting that he was *non compos mentis* at the time of making the same. And in this bill, as well as in her answer to the appellant's bill, she insisted, that the said will was a forged will, and made and contrived by *Higgons* and one *Ward*; and therefore prayed, that the defendants might set forth what title they had to the moiety of the said estate, of which *Higgons* died in possession. The appellant by his answer to this bill disclaimed any other title to the said moiety, but only as a creditor of *Higgons*; and prayed that the same might be sold and his debt paid, pursuant to the will.

Both these causes being at issue, and witnesses examined, they were heard on the 24th of *January*, 1718, before the Lord Chancellor *Macclesfield*; when it was ordered and decreed, that the respondent should proceed to a trial at law at the next *York* assizes, in an ejectment, to which the appellant was to appear and plead to issue, and to admit that *John Metcalfe* died seised in fee, and that the respondent was one of his coheirs, and entitled to a moiety of the estate not disposed of by deed or will: And the defendant *Banister* was ordered to pay the respondent 150*l.* and to the appellant 100*l.* out of the rents and profits of the estate in his hands, in order to enable them to proceed to such trial.

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The appellant being advised it was necessary for him to prove the said *John Metcalfe's* will at the trial, and the original will being by order brought into Court; he on the 1st of July, 1719, moved the Court that the said will might be delivered to him, to the end he might shew the same to some persons who were likely to know the hand-writing of the witnesses thereto, they being all dead; but it was then ordered, that the will should be delivered to such person as the respondent should think proper to be intrusted with it, to be nominated by her in two days, and to remain in his hands, in order to be shewn to such persons as the appellant should desire. But the appellant, for want of having the will delivered to him, in order to be carried down into *Staffordshire*, to shew to some persons there, who were acquainted with *Sir Thomas Pershall's* hand-writing, he being a witness to the said will, was not prepared with witnesses to go down to the assizes at *York*, to prove the said *Sir Thomas Pershall's* hand-writing; and therefore, on the 11th of July, 1719, at least a week before the assizes, the appellant gave notice to the respondent's agent and solicitor, in writing, that he could not appear at the assizes, to make any defence at the trial, for want of having *Mr. Metcalfe's* original will, to shew to some persons who were acquainted with *Sir Thomas Pershall's* hand-writing; and accordingly, the appellant did not go down to *York*, or make any defence at the trial; so that the respondent obtained a verdict by default.

On the 10th of *December*, 1719, the causes were heard on the equity reserved; when it was decreed, that the *Lady Pershall* should have possession of the moiety of the estate in question; and that the receiver formerly appointed by order of the Court, should account before a Master, and pay to her all the rents in his hands; and that *Banister* should also account for and pay to the respondent all the rents in his hands, and he was to be allowed the 150*l.* which he had paid *Lady Pershall*, and also 120*l.* which in the decree was said to have been paid to the appellant, pursuant to the order made on the former hearing; and the appellant was to pay 40*s.* costs to *Lady Pershall*, which he was ordered to pay to *Banister*, and a perpetual injunction was ordered to quiet the respondent in possession; and the appellant having received the said 120*l.* in order to make his defence at the trial, he was ordered to pay the same to the respondent: And it was further ordered, that the appellant's

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cross bill, as to the respondent, should stand dismissed, with costs to be taxed; and that the appellant should pay the respondent the costs of the suit wherein she was plaintiff, to be taxed by the Master; and that all the deeds and writings belonging to the said moiety, should be brought before the Master, and that the will of Mr. *Metcalf* should be left with the Register, subject to the further order of the Court.

J. Willes. From both these decrees of the 24th of *January*, 1718, and
W. Fortescue. 10th of *December*, 1719, and also from the order of the 1st of
July, 1719, the appellant appealed; insisting, that *Metcalf's*
will having been read at the first hearing of the cause, ought to
have been admitted as a good will, at least as to the appellant's
demand, after above 40 years quiet possession under it; and that
after so long an enjoyment, and when all the witnesses to the
will were dead, the appellant, who had no other claim upon the
estate, but as a *bonâ fide* creditor for money actually advanced to
Higgons, who was himself above 20 years in quiet possession of
the premises, ought not to have been decreed to go to a trial,
upon the validity of this will; and more especially, since Sir
Thomas Pershall, the respondent's own husband, was one of the
witnesses thereto. That if the trial had been properly directed,
yet the original will, which the appellant was to support at
such trial, and under which he was to make his defence, ought
to have been delivered to him, and not to such person as the
respondent should name; she claiming the premises in question
as one of the coheirs at law of her father, the testator: And
tho' this order for the delivery of the will, was the reason why
the appellant could not defend himself at the trial; yet the verdict
then obtained by default, was apprehended to be the only
foundation for decreeing a perpetual injunction against him;
and had since been attended with this further bad consequence,
that the will was now pretended by the respondent to be lost;
tho' by the decree it was expressly ordered to be left with the
Register of the Court of Chancery, but which had never been
done. That the appellant ought to have retained the money
paid him by *Banister*, in part of what was ordered him by the
Court of Chancery, and what other sums he had before received
of *Banister*, and likewise to have had the money remaining in
Banister's hands at the time of *Higgons's* death; or at least so
much as would make up the 250*l.* assigned to him by *Higgons*
in part of his debt; and if there was not sufficient for that
purpose,

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purpose, the respondent ought to have paid the appellant the 150*l.* which she received of *Banister*. That even if the respondent had made out a good title to the premises in question, yet she ought not, under the circumstances of this case, to have had an account of the rents and profits for any longer time, than from the filing of her bill in 1712; but the rents and profits received by *Higgon*s, prior to that time, or by any other person for his use and benefit, ought to have been applied towards satisfaction of his just debts. That considering the whole circumstances of the case, and that the appellant was a *bona fide* creditor; that there had been above forty years possession under *Metcalf*e's will; that there was but one verdict in favour of the respondent, and even that obtained by default, in the manner before mentioned; it was apprehended to be exceedingly hard to decree a perpetual injunction, to quiet the respondent in the possession of the premises, and not leave the appellant to pursue his remedy against her at law, as he could, for the recovery of his just debt. But in all events, his bill ought not to have been dismissed with costs, nor ought he to have been decreed to pay the respondent the costs of the cause wherein she was the plaintiff. And therefore it was hoped, that the said several decrees and order would be reversed.

On the other side it was contended, that the will never having been proved, and the witnesses examined in the cause having convincingly proved *Metcalf*e's insanity, at the time of the pretended execution of this will; the Court very justly refused to intrust the original will, which laboured under such manifest objections, with the appellant, in order to prevent any ill use which might have been made of it; but directed it to be put into the hands of a person nominated by the respondent, and by him to be shewn to such persons, as the appellant should desire. That the appellant had accordingly an opportunity of seeing the will, and he also brought several persons to look at it, particularly the son of *William Ward*, one of the pretended witnesses; and if *Ward* really was a witness, there could be no great difficulty for the son to prove the father's hand-writing. Nor could it be supposed difficult to prove the hand-writing of *Sir Thomas Pershall*, the other pretended witness, he being a person very well known in the world; and the appellant had actually 20*l.* paid to him for carrying down two witnesses, whom he alledged he had in town to prove *Sir Thomas Pershall*'s hand.

C. Talbot.
W. Hamilton.

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hand. That if it had been necessary to carry the will into *Staffordshire, Freeman*, in whose hands it was, offered to go there with it, for so small a sum as five guineas; and if he had in any manner misbehaved himself, the appellant might, and probably would have applied to the Court, when proper directions would doubtless have been thereupon given. That this will was never proved, either in the Spiritual Court, or in the Court of Chancery; but *Eleanor*, the pretended devisee and executrix thereof having renounced, administration was granted to *William Ward*, one of the pretended witnesses to the will, who, upon that occasion, must have sworn that he believed the deceased died intestate. That the appellant made no attempt to prove the will, or examine any witnesses thereto, before the cause was heard; and tho' he was indulged with an opportunity of making proof thereof at the trial, yet he did not think fit so to do, or even to make any defence, nor to move for a new trial, when the cause was heard upon the equity reserved; but by his acquiescence under the last decree, had induced the respondent, relying upon the justice thereof, to sell the estate for a valuable consideration; And therefore it was hoped, that the decrees and order would be affirmed, and the appeal dismissed with costs.

DECREES
reversed
in part.
Jour. vol. 23.
P. 48.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the orders or decrees therein complained of, of the 24th of *January*, 1718, and the 1st of *July*, 1719, should be affirmed: And it was further ORDERED and ADJUDGED, that so much of the decree of the 10th of *December*, 1719, as directed costs in equity to be paid by the appellant, in either of the two causes, should be reversed; but that the same decree, in all other respects, should be affirmed: And it was further ORDERED, that what of the said costs in equity the appellant might have already paid, should be repaid to him by the respondent.

The Mayor, Aldermen and Burgesſes of } Appellants. Cafe 35.
the Town of Salop, -

His Maſteſty's Attorney-general, at the
Relation of the Maſter, Fellows and } Respondents.
Scholars of St. John's College in the
Univerſity of Cambridge, -

28th February, 1726.

KING Edward VI. by letters patent, dated the 10th of Bunb. 215.
February, 1552, founded a free grammar ſchool in
Shrewſbury, in the county of Salop, for the inſtruction of youth,
to conſiſt of one Schoolmaſter, and one Under-ſchoolmaſter, to
continue for ever; and for the maintenance of the ſaid ſchool,
granted to the then Bailiffs and Burgeſſes of the town of Shrewſ-
bury, and their ſucceſſors, the tiſhes of ſeveral pariſhes and
lands therein mentioned, worth 28*l.* per ann.; and gave power
alſo to the ſaid Bailiffs and Burgeſſes, and their ſucceſſors, of
naming and appointing a Schoolmaſter and Under-ſchoolmaſter
of the ſaid ſchool, as often as the ſame became void; and that
the Bailiffs and Burgeſſes, with the advice of the Biſhop of
Litchfield and Coventry for the time being, ſhould and might
make fit and whoſome ſtatutes and ordinances in writing, con-
cerning the ordering, government and direction of the School-
maſters and ſcholars, and the ſtipends of the Schoolmaſters,
and other things touching the government, preſervation and
diſpoſition of the rents and revenues appointed, or to be ap-
pointed for the ſupport of the ſaid ſchool; which ſtatutes and
ordinances, being ſo made, ſhould be kept inviolable for ever.

Queen Elizabeth, by indenture dated the 23d day of May,
in the 13th year of her reign, and made between her and the
Bailiffs and Burgeſſes of the ſaid town of Shrewſbury, for the
advancement and better maintenance of the ſaid grammar ſchool,
and for the maintenance of divine ſervice in the ſeveral chapels
therein mentioned, did grant unto the ſaid Bailiffs and Bur-
geſſes, and their ſucceſſors, the reversion of ſeveral tiſhes and
hereditaments therein mentioned; and in conſideration thereof,
the Bailiffs and Burgeſſes for themſelves and their ſucceſſors,

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did covenant with the Queen, her heirs and successors, to employ and bestow the residue of all the revenues, after payment of several pensions therein mentioned, for the better maintenance of the said free grammar school, founded by King Edward VI. according to such orders and constitutions, as should be taken in that behalf by *Thomas Ashton*, Clerk, then Head Schoolmaster; and if he died before, then according to such as the Bishop of *Litchfield* and *Coventry*, and the Dean of *Litchfield* should make concerning the said revenues; with a proviso, if the Bailiffs and Burgeses did not perform their covenants, for the Queen to re-enter.

By indenture tripartite, dated the 11th of February, 1578, made between the Bishop of *Litchfield* and *Coventry* of the first part, the Bailiffs and Burgeses of *Salop* of the second part, the Master and Fellows of *St. John's* college in *Cambridge*, and Mr. *Ashton*, then late Head Schoolmaster, and Mr. *Lawrence*, the then present Head Schoolmaster, of the third part; reciting the said former grants, and that the Bailiffs and Burgeses had, by advice of the said Bishop, made orders in writing for the government of the school, pursuant to the grant of King Edward VI. And that Mr. *Ashton* had made orders, according to the effect of the Queen's letters patent, without fraud; it was agreed by all the parties to this indenture, to perform the said orders and constitutions in the schedules thereto annexed, and use all the lawful means to redress the breach thereof.

To this deed, two sets of ordinances were annexed; viz. one made by Mr. *Ashton*, with the approbation of the Bailiffs and Burgeses, and the advice and consent of the Bishop of *Litchfield* and *Coventry*, consisting of twenty one ordinances, concerning the revenues and other matters relating to the school: And the other, consisting of thirty eight ordinances, or bye-laws made by the Bailiffs and Burgeses, with the consent of the Bishop and Mr. *Ashton*, concerning the government, qualities, manners and learning, as also the election, admission, expulsion and other things relating to the Schoolmasters and scholars of the said school.

By the seventh ordinance, made by the Bailiffs and Burgeses, it was ordained, that there should be three Schoolmasters, called the Head Schoolmaster, the Second Schoolmaster, and the

Third

Third Schoolmaster; and when any of the three rooms of the said Schoolmasters should be vacant, the other Schoolmaster or Schoolmasters should forthwith give notice to the Bailiffs of the town, which Bailiffs should have the nomination and appointment of the said Schoolmasters, with the advice of the Bishop of *Litchfield* and *Coventry*, for the time being, according to the tenor, true meaning and effect of King *Edward VI.*'s patent: Nevertheless to the intent, that such Schoolmasters might be, from time to time, elected of such as should be best able to supply those functions or rooms, and of such as had been, or should be scholars in the said school, if any such there should be; it was ordained, that the Bailiffs of the said town should, from time to time, within twenty days next after such notice to them given, give advertisement and knowledge of such avoidance to the Master and Fellows of *St. John's* college, with request to them to elect and send to the said Bailiffs, one able, meet and apt man for that purpose, with the testimony of his conversation, by letters under their seal of office, to be by them elected for ever, under the several qualifications, and in manner and form following, *viz.* of such as were, or should be born within the town of *Salop*, being the legitimate son of a Burgess there, and having been a scholar in the said free school, if any such there should be: And in default thereof, then of such as were, or should be born within the liberties and franchises of the said town, or in the abbey *Forgeate*, adjoining to the said town, being the legitimate son of a Burgess there, and having been a scholar in the said school, if any such should be: And in default thereof, then of some sufficient man, born in the county of *Salop*, and brought up in the said school: And in default thereof, then of some sufficient man born in any other county.

By the eighth ordinance it was ordained, that the Schoolmaster so to be appointed, at his coming from the college, should first repair to the Bishop of *Litchfield* and *Coventry*, to be by him allowed and sworn, according to the statutes of the realm; and then to bring with him the said Bishop's testimonial, under his hand and seal, and then to be allowed of by the Bailiffs, if they should so think worthy of him; and if the Bailiffs should mislike of such person, upon cause reasonable, then they were forthwith to certify such cause of their mislike to the Master and Fellows of the said college; and thereupon they were

Cases in Parliament.

were to make a new election in form aforesaid, of another Schoolmaster or Schoolmasters to supply the room so void, and him to commend and send to the Bailiffs as aforesaid.

In July, 1723, the appellants nominated *Hugh Owen*, Clerk, to be Head Master of the said school, upon the resignation of Mr. *Richard Lloyd*. And in *Michaelmas* term following, an information was filed in the Court of Exchequer by the Attorney-general, at the relation of the college, against the appellants and the said Mr. *Owen*; setting forth, *inter alia*, the several matters before mentioned; and that upon a vacancy of Head Master of the school in June, 1723, the appellants, without any advertisement, or notice given to the respondents, or a testimonial from the Bishop, unduly placed Mr. *Owen* in the said school, who was not a master of arts, or of any standing in either of the universities, or in any respect qualified to be Head Master, according to the said seventh and eighth ordinances; and therefore prayed, that the appellants might discover the premises, and set forth all the ordinances, and how the Schoolmasters had, from time to time been chosen, and whether they had not been always recommended by the college; and that they might discover all deeds, grants and other entries and memorandums, relating to the elections of Schoolmasters by the said college; and that the Schoolmasters might be elected, from time to time, pursuant to the ordinances, and that the said ordinances, or such of them as appeared reasonable for governing and ordering the affairs of the school, might be established by the decree of the Court.

To this information, the appellants put in their answer under their common seal, and thereby confessed the several grants and the said indenture tripartite, with the ordinances thereto annexed; but insisted, that by the charter of King *Edward VI.* they had the sole power of nominating the Head and Second Schoolmasters of the said free grammar school, exclusive of the Bishop of *Litchfield* and *Coventry* and the relators; and they admitted, that they did refuse to give advertisement to the college, to send a fit person to succeed Mr. *Lloyd*, as Head Schoolmaster.

On the 16th of *May*, 1726, the cause was heard before the Lord Chief Baron *Gilbert*, Mr. Baron *Price*, Mr. Baron *Page* and Mr. Baron *Hale*; when, upon reading the charter of *Edward VI.* the grant of the 13th *Eliz.* and the indenture tripartite of the 20th *Eliz.* with the several ordinances or bye-laws thereto annexed, and likewise an antient book of entries of several letters, and other original letters from the Bailiffs under their corporation seal, and hearing what was alledged by counsel on both sides; the Court declared the seventh and eighth ordinances or bye-laws to be just and reasonable, and made pursuant to the intent of the said charter of King *Edward VI.* and thereupon unanimously ordered, adjudged and decreed, that the relators should elect a fit person, pursuant to the directions given by the said seventh and eighth ordinances; that Mr. *Owen*, the then Head Schoolmaster, not being chosen pursuant to the said ordinances and charter of King *Edward VI.* should be displaced; and that the Mayor and corporation should proceed forthwith to a new election of a Head Schoolmaster, pursuant to the direction of the seventh and eighth ordinances or bye-laws; and ordered costs to be paid to the relators, to be taxed by the Deputy Remembrancer.

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From this decree, the corporation appealed; and on their behalf it was contended, that by the letters patent of *Edward VI.* the sole power of appointing the Schoolmasters was granted to the Bailiffs and Burgeses, and their successors; and that the power thereby given them, with the advice of the Bishop of *Litchfield* and *Cowentry*, to make ordinances and bye-laws, respected only the order, government and direction of the school, the stipend and salary of the Schoolmasters, and other things relating to the school, and the rents and revenues thereof; but not to the election or appointment of the Schoolmasters. That no alteration, as to this election or appointment, was made by the indenture of the 23d of *May*, 13th *Eliz.* but all that the appellants predecessors thereby covenanted to do, was to pay the several stipends therein mentioned, and to indemnify the Crown against the same, and to employ the residue of the revenues for the better maintenance of the school, according to such orders as should be taken by the said *Thomas Ashton*; or if he died before any such orders, then according to such as should be taken by the Bishop and the Dean of *Litchfield*. It was therefore insisted, that the power of appointing Schoolmasters,

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J. Willes.

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which, by the letters patent of *Edward VI.* was vested in the Bailiffs and Burgeses, still remained in the appellants; for this being a trust reposed by the Crown in the Bailiffs and Burgeses, and their successors, they could not divest themselves of such power, or transfer it to any other persons; consequently, that the seventh and eighth ordinances, which were endeavoured to be established by this decree, so far as they concerned the election of the Schoolmasters, were absolutely null and void, not being warranted by the letters patent, but being repugnant thereto, and contrary to law.

P. Yorke.

T. Lutwyche.

On the other side it was argued, that the ordinances made by the Bailiffs and Burgeses, with the consent of the Bishop of *Litchfield* and *Coventry*, and those made by Mr. *Ashton*, were strictly pursuant to the tenor of the charter of King *Edward VI.* and were put into writing according to the directions of that charter; and that no alterations were therein made, save only, that the Queen having by her grant given an additional revenue of 300*l.* per ann. to the school, and for other pious purposes; instead of two Masters mentioned in the first charter, the school was then enlarged, and another Master added thereto. That these ordinances had been strictly observed by all the Bailiffs and Burgeses, for the time being, and since by the Mayors of *Salop*, for 150 years and upwards; and the Bailiffs or Mayors constantly gave notice of the vacancy of a Head Schoolmaster, to the Master and Fellows of *St. John's* college, in order for them to elect a fit person, according to the seventh and eighth ordinances; as appeared by the entries of letters to and from the college for that purpose, ever since: Nor was there one instance of a Head Schoolmaster being otherwise elected, till the present. That Mr. *Lloyd*, the last Head Schoolmaster, was obliged by a decree of the Court of Chancery, to surrender his place, for breach of the sixth ordinance; wherein it is ordained, "That
" no Head Master of the said school can be capable of having
" any cure of souls, and at the same time keep the said school;" which plainly shewed, that the Mayor and corporation apprehended the ordinances to be just, and still in force. That these ordinances had also received the sanction of the Court of Chancery, so long ago as the 11th of *James I.* when in a cause between the then Head Master of the school and the Bailiffs of the town, relating to some misdemeanors of one *Gittings*, the

Second

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Second Master, in breach of the ordinances, the Lord Chancellor Ellesmere decreed, "That the said *Gittings* should depart from the said school, and that the Master and Fellows of *St. John's* college should forthwith be acquainted therewith, and proceed to a new election for that purpose, according to the true meaning of the said ordinances." That it might be of mischievous consequence, to suffer the corporation to depart from these ordinances, and thereby get to themselves the entire nomination and election of the Head Schoolmaster; for by the said indenture and ordinances, the Head Schoolmaster is in the nature of a trustee, or check upon the corporation, that the revenue of the school may not be misapplied, or embezzled; for the preservation of which, the Head Master, by the following ordinances, hath the chief management and government: By the sixteenth ordinance, made by Mr. *Ashton*, "The Bailiffs are to be yearly sworn, in the presence of the Head Master, to observe the ordinances relating to the school revenue." By the fourteenth, "No lease of the revenue can be granted, without being countersigned by the Master:" By the seventh, "The Head Master is to have the custody of one of the four keys of the treasury, where the stock remanent is kept in the said town." By the eighth, "No money is to be disposed of out of the stock remanent, exceeding 10*l.* without the consent of the Head Master and *St. John's* college, under their common seal:" And by the seventeenth ordinance, made by the Bailiffs and Burgeffes, with the advice and consent of the Bishop and Mr. *Ashton*, "No Second Master is to be chosen, without the consent of the said Bishop and the Head Master." It was therefore prayed, that the decree made by the Barons of the Exchequer might be affirmed, with costs.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

DECREE affirmed.
Jour. vol. 23.
p. 52.

Elizabeth

Case 36. *Elizabeth Dutchess Dowager of Hamilton*, Relict of *James Duke of Hamilton*, Lady *Charlotte Orby*, Relict, Executrix and general Devisee of Sir *Thomas Orby*, Bart. *John Elrington*, *Gerard Elrington*, *Thomas Collett* and *Elizabeth* his Wife, and *Henry Symes* and *Henrietta* his Wife, } Appellants.

Charles Mordaunt, Esq; Sir *John Hobart*, Bart. *John Duke of Argyle*, *Archibald Earl of Islay*, Sir *Robert Rich*, Bart. and Dame *Elizabeth* his Wife, *William Stanhope*, Esq; and others, } Respondents.

9th March, 1726.

2 Vern. 531.
542.
1 Eq. ab. 343.
ca. 5.
Preced. in
Chan. 257.
3 Chan. Rep.
56.
2 Freeman's
Rep. 291.
Viner, vol. 16.
p. 473, ca. 5.
vol. 19, p. 137.
ca. 11.
Gilb. Rep.
45.

PREVIOUS to the marriage of *Charles Lord Brandon*, eldest son of *Charles Earl of Macclesfield*, with *Ann Mason*, the daughter of *Richard Mason*, by indentures of lease and release dated the 23d and 24th of *April*, 1683, the Earl and Lord *Brandon* his son, conveyed to Sir *Henry Hobart* and the said *Richard Mason* and their heirs, divers manors and estates in the counties of *Chester* and *Lancaster*, in order to make them tenants of the freehold, that common recoveries might be thereof suffered; and which, when suffered, were thereby declared to be to the use of the Earl for 99 years, if he should so long live, subject to a rent-charge of 1000*l.* per ann. to Lord *Brandon* and the said *Ann*, in manner therein mentioned; remainder to trustees to preserve the contingent remainders; then to trustees for 300 years, to raise and pay any sum not exceeding 1200*l.* to such persons as the Earl should appoint; remainder to Lord *Brandon* for 99 years, if he should so long live; remainder to trustees to preserve the contingent remainders; remainder to the first and every other son of Lord *Brandon*, successively in tail male; remainder to *Fitton Gerard*, second son of the Earl, for 99 years, if he should so long live; remainder

remainder to trustees to preserve the contingent remainders; remainder to the first and other sons of *Fitton*, successively in tail male; remainder to every other son of the Earl, in tail male successively; remainder to the Earl, his heirs and assigns.

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And in this settlement, a power was reserved to the Earl, Lord *Brandon*, and the said *Fitton*, that as, and when every of them should come into and be in possession of the premises, by virtue of the above limitations; it should be lawful for them, from time to time, during their lives, by indentures under their respective hands and seals, to lease all and every or any part thereof, to any person or persons, for any term or number of years, not exceeding 21 years, or for one, two, or three lives, or for any term or number of years, determinable on the death of one, two, or three persons, in possession, but not in reversion, remainder, or expectancy; so as upon every such lease of such parts of the premises, as had been anciently and accustomarily demised, whereof fines had been usually taken, the old usual and accustomable yearly rent or rents, or more, should be yearly reserved and made payable, during the continuance thereof respectively; and so as upon every lease of such part of the premises as had not been usually let, and for which there had not been any fine or fines formerly taken, there should be reserved and made payable, during the continuance of the same respectively, the most and best improved yearly rent that could be reasonably had or obtained for the same; and so as no such leases should be made dispunishable of waste; and so as the lessee and lessees to whom the same should be made, should respectively seal and deliver counterparts thereof: And it was by the same indenture further declared, that till the suffering the said recoveries, the said *Hobart* and *Mason*, and their heirs, should stand and be seised of the said manors and premises intended to be therein comprised, in trust for such person and persons, and for such estate and estates, as and to whom the use of the same premises were before mentioned and declared concerning the same.

The marriage soon afterwards took effect, but no recoveries were ever suffered of the premises, pursuant to the covenant.

The Earl of *Macclesfield* died in January, 1692, leaving issue two sons, viz. the said *Charles* Lord *Brandon*, and *Fitton*

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Gerard, and three daughters, viz. the appellant Lady *Charlotte Orby*, *Elizabeth Lady Gerard*, mother of the appellant the Dutchess of *Hamilton*, and Lady *Ann Elrington*, mother of the appellants *John* and *Gerard Elrington*.

Upon Earl *Charles* the father's death, the said manors and premises came to his eldest son *Charles* then Earl of *Macclesfield*, who took possession and enjoyed the same during his life; and became also entitled to the reversion in fee thereof, as being heir of his father, to whom the reversion was limited by the settlement. And in 1698, his marriage with the said *Ann Mason* was dissolved by act of Parliament; and the children of that marriage were declared illegitimate.

Earl *Charles* the son, by his will, dated the 2d of *July*, 1701, devised all the said manors and premises, and the reversion and remainder thereof, in case he should die without issue, to *Charles Lord Mobun* and his heirs, whom he appointed sole executor of his will: And in *November* following, the testator died without issue; whereupon and by virtue of his said will, the reversion in fee of the said manors and premises expectant upon the death of *Fitton*, then Earl of *Macclesfield*, became vested in Lord *Mobun*; and Earl *Fitton* became entitled to the same for the term of 99 years, determinable on his death; and he entered into the possession thereof accordingly.

By indenture of lease, dated the 21st of *December*, 1702, Earl *Fitton*, after reciting his power of leasing, demised to Sir *Charles Orby* and *Thomas*, afterwards Sir *Thomas Orby*, all the messuages, tenements and farms in *Gawsworth*, *Boseley*, *Siddington*, *Aldford*, *Whistefield*, and *Winblestow*, in the county of *Chester*; and all other the messuages, cottages, lands, tenements and hereditaments whatsoever, comprised in the said settlement, which had been usually letten and fines taken for the same; and all other lands which were within the compass and intent of the said power, and every part thereof; to hold for the term of 99 years, if the said Sir *Thomas Orby* and *Ferdinando Fairfax*, and the appellant *Elizabeth Collett* (then *Elizabeth Ashton*) or any of them should so long live, so as the said lessees should seal and deliver a counterpart of such lease; yielding and paying therefore, during the said term, at or upon the days and times in that behalf used and accustomed, the

the several and respective old accustomed rents reserved and payable for the said several messuages, tenements and farms thereby leased, according to the intent and meaning of the said proviso.

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And by another indenture bearing date the same day, it was declared, that the said lease was made in trust to pay 200*l.* per ann. to the appellants *Elizabeth Collett* and *Henrietta Symes*, and to pay the residue of the rents and profits in thirds; one third to the appellant the Dutches of *Hamilton*, one third to *Sir Thomas Orby*, and the remaining third between *Elizabeth Orby*, daughter of the said *Sir Thomas*, and who afterwards intermarried with the respondent *Robert Hunter*, and the appellants *John* and *Gerard Elrington* and *Robert Elrington*, deceased.

By another lease dated the 22d of the same *December*, 1702, *Earl Fitton* demised to the said *Sir Thomas Orby*, the capital messuages, tenements and farms in the counties of *Chester* and *Lancaster*, for which fines had not been usually taken, and of which there was then no lease for years, or for any life in being; to hold for 99 years, if the appellant the Dutches of *Hamilton*, and the said *Sir Thomas Orby* and the Lord *Mobun*, or any of them should so long live; yielding yearly, during the said term, such sum and sums of money as should amount to the most and best improved yearly rent that could be reasonably had and obtained for the same.

In the same month *Earl Fitton* died without issue; upon whose death, the Lord *Mobun* brought ejectments against the lessees for recovery of the premises: Whereupon in *Trinity* term, 1704, *Sir Thomas Orby* and the appellant the Dutches, together with *Elizabeth Orby* the daughter, and the appellants *John* and *Gerard Elrington*, *Elizabeth Collett* and *Henrietta Symes*, exhibited their bill in Chancery against the Lord *Mobun*, *Sir John Hobart* and others, to have the said two leases established, and the lessees quieted in possession of the premises thereby demised to them, and for an injunction to stay Lord *Mobun's* proceedings at law on his ejectments.

To this bill the defendants answered, and in *December* following, Lord *Mobun* exhibited his cross bill to set aside the two leases, and that *Sir John Hobart* might convey the fee simple and

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and inheritance of the said manors and premisses to the Lord *Mobun* and his heirs, and in the mean time be declared his trustee; and that the lessees might account with Lord *Mobun* for the rents and profits of the premisses received by them, since Earl *Fitton's* death; and deliver up to him all the deeds and writings relating thereto.

On the 28th and 29th of *January*, and 1st of *February*, 1705, both causes came on to be heard before the Lord Keeper *Cowper*, assisted by the Lord Chief Justice *Holt* and the Lord Chief Justice *Trevor*; who having heard the solemn arguments of counsel on each side, did, on a subsequent day, viz. the 15th of *April*, 1706, deliver their opinions *seriatim*; and then the Lord Keeper, with the concurring opinion of the Lord Chief Justice *Trevor*, *inter alia*, decreed, that as to the two leases made by Earl *Fitton*, dated the 21st and 22d of *December*, 1702, the same were not good as against the Lord *Mobun*, the remainderman in the settlement; and therefore ordered, that the plaintiffs bill in the first cause, as to the relief thereby sought in respect of those leases, should stand dismissed: And in the cross cause, Sir *John Hobart* was decreed, so soon as he should come of age, to convey the fee simple and inheritance of all the said premisses to the Lord *Mobun* and his heirs; and that Lord *Mobun* and his heirs, should be at liberty to make use of Sir *John Hobart's* name, for recovering possession of the same premisses; and all the deeds, evidences and writings, belonging to the premisses in question, which the plaintiffs in the original cause had, or could come by, were forthwith to be delivered to the Lord *Mobun*; and the injunction formerly granted as to the said premisses was dissolved.

This decree was afterwards signed and inrolled, and Lord *Mobun* recovered possession of the premisses, and Sir *John Hobart*, on his coming of age, conveyed the legal estate thereof to him, or as he directed; and from the time of pronouncing the decree to the bringing of the present appeal, being upwards of 20 years, there had not been one step taken in the cause, but the justice of the decree and proceedings had been entirely acquiesced under.

Charles Lord *Mobun* afterwards died without issue, having by will devised all the said manors and premisses to his wife *Elizabeth* Lady *Mobun*, and her heirs.

Afterwards,

Afterwards, in the year 1716, and previous to the marriage of Lady *Mobun* with the respondent *Charles Mordaunt*, and in consideration of that marriage, by indentures of lease and release dated the 22d and 23d of *April*, 1717, Lady *Mobun* conveyed to trustees and their heirs, all the said manors and premises, to the use of the respondents the Duke of *Argyle* and Earl *Islay* for 1000 years, upon the trusts after mentioned; remainder to the Lady *Mobun* for life; remainder to such person, and for such estate, and subject to such charges, as she solely should, by any writing under her hand and seal, attested by three witnesses, direct or appoint: And the trust term was declared to be for raising 3000*l.* for payment of debts; and also for raising 40,000*l.* for the marriage portions of *Elizabeth* and *Ann*, the two children of Lady *Mobun*, and 10,000*l.* for the respondent *Charles Mordaunt*, to be raised and paid *pari passu*.

The Lady *Mobun* by her deed poll dated the 30th of *December*, 1724, directed and appointed that the said manors and premises, subject to the several trusts of the said term of 1000 years, should from and immediately after her decease, be and remain to the use of trustees and their heirs, upon trust, that they should as soon as conveniently might be after her death, sell the same, and thereout pay the several sums therein mentioned, amounting in the whole to 8000*l.* and upwards, to the several persons in the said deed named; and she directed the residue of the monies arising from the sale, to be paid to the respondent *Charles Mordaunt*, for his own use.

The respondents Sir *Robert Rich* and *William Stanhope* intermarried with the said *Elizabeth* and *Ann*, the Lady *Mobun*'s two daughters, and thereby became entitled to the 20,000*l.* a-piece so charged on the estate for the marriage portions of the said *Elizabeth* and *Ann*; and in consideration thereof, they made suitable settlements on the said *Elizabeth* and *Ann*, and their issue, so that they became purchasers for a valuable consideration of the said 40,000*l.* so charged on the said estate.

In *May*, 1725, the Lady *Mobun* died; and some time afterwards the respondent *Charles Mordaunt* filed his bill in the Court of Chancery, to have the trusts of the said deeds executed, and the trust estates sold for the purposes aforesaid; and that cause coming on to be heard, a sale was decreed accordingly to the

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best purchaser, to be approved by a Master, in order to pay the debts, portions and other charges affecting the premises.

P. Yorke.

T. Lutwyche.

After all these transactions, and above 20 years acquiescence under the decree of the 15th of *April*, 1706, the present appeal was brought, in order to reverse that decree; and on behalf of the appellants, it was said to have been objected at the hearing, against the validity of the lease of the 21st of *December*, 1702,

I. That it ought to have mentioned the particular rent reserved.

II. That the ancient and accustomed rent was thereby reserved, as well for lands not anciently leased, as for those that were; and that therefore, it was contrary to the meaning of the power.

As to the first objection, it was argued, that the specifying a certain sum in the reservation of a lease is clearly not necessary, if the particular rent intended may be known by proper reference: *Certum est quod certum reddi potest*, is an undoubted maxim both in law and reason. What those ancient rents were, was a matter of fact capable of being known, and without difficulty, by those who had the writings of the estate, and had been fully ascertained by the plaintiffs in the original cause. That the reservation was in the same terms with the power, and consequently was pursuant to it. That the plain meaning of the restriction in the power, was to secure the ancient rents to the remainder-man: If he had these, he had all that was intended him, and there could be no doubt but he would be entitled to them by this reservation; but there was no appearance in the settlement, of any intention in the parties, to have those rents ascertained in any particular manner. That it would hardly be doubted, that such a reservation of rent by the owner of the fee would be good, which it could not be, if it had not such a certainty as the law requires; and it did not appear that there was any design in the maker of the settlement, to exact a greater degree of certainty in this respect, than what was required by law. That the intention and endeavours of Earl *Fitton* to execute this power in the fullest manner in favour of the heirs at law, was manifest; and the defect, if it was any, ought to be supplied by a Court of Equity; especially, if the same was occasioned by the agents of Lord *Mohun*, in neglecting to shew Earl *Fitton* the proper evidences to ascertain this rent; for it seemed contrary to conscience, that Lord *Mohun* should gain by his own wrong, especially when he himself was a

stranger

stranger and volunteer, and would deprive the heirs at law (notwithstanding he had got all the residue of Earl Charles's estate, to the amount of near 150,000*l.*) of that small interest in their father's and grandfather's estate, which was given them in lieu of the whole, which ought naturally to have descended to them.

As to the other objection, it was argued, that the demise in the words of it was several, and to put this construction upon them, would be to make them joint, contrary to the plain words and intention of the lessor. That the reservation of the several and respective ancient rents for the several and respective messuages, &c. could not mean any thing but such rent for each tenement, as was anciently reserved for the same, and it would be difficult to use plainer and stronger words to import the meaning. That the words *yielding therefore*, must be understood *reddendo singula singulis*, and which method of interpretation, the law prescribes in many instances, not so strong as this; so that as to those parts of the estate demised, if there was any which had no ancient rent, no rent was reserved by this reservation, and consequently as to those the power was not executed. — As to the length of time since the decree, and the several subsequent transactions stated by the respondents, it was said to be not uncommon for decrees to be reversed after a great length of time, and that this objection ought not to be imputed to the appellants, who had been feme coverts, or infants, or abroad in his Majesty's service, since the making of the decree. As to the pretended incumbrances, if there were any, the appellants were wholly strangers to them, nor could they in any wise vary or affect their right; and particularly, as all, or the greatest part of these incumbrances, appeared to be many years subsequent to the appellants claim under Earl Fitton: And as to the decree for sale, the appellants were not parties, or privy to it. That their demand went only to those farms which were usually leased upon fines, and happened to be out of lease in December, 1702, which was but a small part of the estate, and in this part, the share the appellants claimed, was only what the farms might be worth, over and above the usual rent: And even this surplus would only continue to them, during the remainder of a lease determinable upon three lives; one of which was dead, and twenty four years worn out in the other two, since the lease was made.

1726.

C. Talbot.

W. Peere
Williams.

On the other side it was insisted, that as to the lease upon which the rent reserved was mentioned to be the *most improved rent*, this reservation was plainly void for the absolute uncertainty of it; consequently, this lease was not warranted by the power, and was accordingly given up at the hearing, by the appellants own counsel. And as to the other lease, *under the several and respective old and accustomed rents, reserved and payable for the said premises*, this was also void as against Lord Mohun, the remainder-man, and not warranted by the power; because there being many farms, and a great estate within this one lease, some let at the ancient rents, and some not, it would put insuperable difficulties upon the remainder-man, to recover his rent due for the premises comprised in this lease; for that in the action or avowries to be made for the rent, he must be so lucky as to point out what was the old rent, for what and for how much land it was paid, and at what times payable; and if the tenant could prove that a different rent was paid for the land, or that any other land was comprised in the lease, or that the rent was formerly payable at any other day, the remainder-man could not recover, but instead of recovering the rent from the tenant, must from time to time pay him costs: Whereas it was intended, that the remainder-man should have as plain, certain and easy a remedy for his rent, as other landlords have, and as the former owners of this great estate anciently had; but upon the lease now in question, it neither appeared what the rent was which the remainder-man was to have, nor for what estate the rent was to be paid, nor when, or on what days it was to grow due, the lease giving the remainder-man no manner of light as to these particulars. That the proviso contained in the power of leasing, in directing that the tenant should seal a counterpart of every lease, shewed, that the intent of the power was to guard against all the foregoing inconveniences, by reducing the premises to a certainty; and that there should be a counterpart of every several lease, of every parcel of land which was formerly let separately, and the particular ancient rent reserved with certainty in each lease, and not one lease only, or a counterpart of a lease of the whole estate, without reserving any certain rent. That as these powers of leasing are generally reserved in all settlements, if so loose an exercise of them should be allowed to the tenant for life, it would introduce the greatest difficulties, and put the greatest hardships upon the jointress, sons and other persons claiming

in remainder, under such settlements; and by such a construction, the tenants for life, by an uncertain, general and short lease of the whole estate, which might be a rash and sudden act, and done with very little expence of money, time or trouble, would be enabled to render the remainders, expectant on the determination of such lease, though settled on the highest consideration, to become of little value; because the persons to whom such remainders belonged, would be in a great measure disabled from recovering any rent for the premises. And as the decree appealed from had been so solemnly pronounced, and so long acquiesced in; and as securities had been since made and accepted under it for debts and marriage portions, by persons not parties to that suit, and who never had any opportunity of defending the same, though they would be very great sufferers, if the decree was reversed; it was hoped, that it would be affirmed, and the appeal dismissed with costs.

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ACCORDINGLY, after hearing counsel on this appeal, and hearing the opinion of the Judges upon a question proposed to them, "Whether the power in the settlement of *Charles Earl of Macclesfield*, to make leases, was well executed;" it was ORDERED and ADJUDGED, that the appeal should be dismissed, and the decree therein complained of, affirmed.

DECREE affirmed.
Jour. vol. 23.
P. 64.

Nathaniel Stratton, Esq; and *Mary* his
Wife, and *William, Edward, Nathaniel*
and *John Stratton*, their Children,

Appellants.

Case 37.

Ann Payne, Spinster,

Respondent.

13th March, 1726.

WILLIAM *Payne*, being seised of a real estate, and possessed of a considerable personal estate, on the 10th of February, 1716, made his will, and duly published the same in the presence of three witnesses; and, as touching his worldly estate, he gave and disposed of the same as follows, viz. he gave to his sister *Carolina Payne* 20*l.* per ann. to be paid her quarterly during her life, out of the revenues of his estate: And as

Viner, vol. 8.
P. 451. ca. 26.
455. ca. 6.
vol. 10. p.
248. note 10
ca. 1.
2 Eq. ca. ab.
325. ca. 30.

1726.

concerning all the rest of his estate, both real and personal, after his debts and funeral charges paid, he gave, devised and bequeathed one moiety, or equal half part thereof, to his sister, the appellant *Mary Stratton*, for her life; and after her decease, to the heirs of her body lawfully begotten, or to be begotten, equally among them all, sons and daughters alike; and the other moiety, or equal half of his estate, real and personal, he gave and bequeathed the same to his sister, the respondent *Ann Payne*, and to the heirs of her body lawfully begotten, or to be begotten; and for want of such issue, or heirs of her body, as aforesaid, he gave and bequeathed the same to the children of his sister, the appellant *Mary Stratton*, equally among them, and to their heirs and assigns for ever, immediately after the decease of his said sister *Mary*, and not before. And appointed his said sisters, the appellant *Mary* and the respondent, joint executrixes of his said will.

The testator died on the 12th of *February*, 1716, unmarried, leaving the appellant *Mary*, the respondent *Ann*, and the said *Carolina Payne*, his sisters and coheirs at law; and immediately after his death, the appellant *Mary* and the respondent *Ann* proved the will in the Archbishop's Court at *Canterbury*, where the original was left and remained there from that time, till the hearing of the cause in *May*, 1720.

The respondent being advised that she was, by the said will, seised of an estate tail in an undivided moiety of the testator's real estate; and that she was well entitled to a moiety of his personal estate, to her own proper use, subject to the testator's debts and legacies; and the testator being, at his death, possessed of 17,890*l.* 5*s.* 2*d.* capital *South-sea* stock; the respondent, in *Easter* term, 1719, exhibited her bill in the Court of Chancery against the appellants and the said *Carolina Payne*, praying that the real and personal estate of the testator might be divided; and that one moiety of the *South-sea* stock, and of all the rest of the testator's real and personal estate, might be allotted, assigned and transferred to the respondent, so as to be at her own disposal, according to the testator's will.

To this bill, the several appellants put in their answers; and the appellants *William*, *Edward*, *Nathaniel* and *John Stratton*, the children, by their answer insisted, that the respondent

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was entitled to a moiety of the testator's real and personal estate during her life only; and that if she should die without issue, living at her death, then after her's and their mother's death, such moiety would go to them; and that the testator did so declare to the person he employed to draw his will, and gave him instructions to draw the same accordingly.

The respondent having replied, divers witnesses were examined on both sides, and the will was proved by two of the subscribing witnesses, the third witness being dead, to be duly executed by the testator, and that he was then of sound and perfect mind and memory.

The cause was first heard on the 28th of May, 1720, before the Lord Chancellor *Macclesfield*, and the probate of the will being in the custody of the appellants *Nathaniel Stratton* and *Mary* his wife, and they not producing the same, the original will was produced by an officer of the Ecclesiastical Court, then attending therewith, and there having been an interlineation in the will, and that interlineation razed out; his Lordship ordered, that it should be referred to Mr. *Dormer*, one of the Masters of the Court, to examine and certify, whether the words in the will, which appeared to be razed, were razed or struck out of the said will, at the time of the testator's death, or not: For discovery whereof, all parties were to be examined upon interrogatories, as the Master should think fit; and upon the Master's report, the Court would give such further directions as should be just. And the Master was also directed to take an account of the testator's personal estate, and directions were given in relation thereto: And as to the *South-sea* stock, either side was to be at liberty to apply to the Court for the sale thereof, as they should think fit; and the testator's personal estate was to be brought before the Master, to be by him placed out at interest, on government or other security, for the benefit of such persons to whom the same should appear to belong: But as to so much of the plaintiffs bill as sought relief, touching the real estate, the same was dismissed with costs. The reason of which dismissal was, because the plaintiff had not brought the said *Carolina Payne*, one of the coheirs, to hearing; so that there were not proper parties before the Court, as to the real estate.

Pursuant

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Pursuant to this decree, the respondent was strictly examined before the Master, touching the rasure; and swore, that she verily believed, the will was as it then appeared to be, at the time it was executed by the testator; that she never took any notice, or heard of any rasure, till after the commission for examining witnesses in the cause was executed, which was in the year 1719, three years after the testator's death; that she verily believed in her conscience, that the will, at the time it was delivered to her, which was immediately after it was executed, was in the same condition and circumstances in every part of it, and with the same rasure, as it appeared to be at the time of her examination, she having no manner of reason to believe, or suspect, that the rasure was made after the will was executed; and that she likewise verily believed, that the interlineation was razed and struck out by *John Cock*, a Schoolmaster, who wrote the will before it was executed.

Several witnesses were likewise examined, concerning this matter, before the Master, who, by his report, dated the 1st of *August*, 1724, stated the substance of the respondent's examination, and the depositions of the witnesses; and the cause coming on to be heard upon this report, before the Master of the Rolls and the Lord Chief Baron *Gilbert*, two of the Lords Commissioners of the Great Seal, on the 15th of *January*, 1724, their Lordships declared, that the devise over of one moiety of the personal estate, after the death of the respondent, without heirs of her body, was a void devise; and that upon the testator's death, the absolute property of such moiety became vested in the respondent, for her own proper use: But in regard the Lord Chief Justice *Raymond*, then also one of the Lords Commissioners, was absent, their Lordships were pleased to declare, they would consult him upon the case, and directed he should be attended with a copy of the will; which was done accordingly, and his Lordship concurred in opinion with the other Lords Commissioners: And the cause standing in the paper for judgment, on the 4th of *March* following, their Lordships were pleased to respite the making any decree therein, till the matter concerning the rasure should be litigated in the Prerogative Court of *Canterbury*, where it was most proper, in regard it concerned personal estate only, and where the appellant *William Stratton*, who was then come of age, had lately commenced

menaced a suit to have the erased words pronounced part of the will.

1726.

After a long contest in the Prerogative Court, where the respondent and *John Cock*, the writer of the will, and several other witnesses were examined over again, touching the rasure; the Judge of that Court declared, that the original will was in the same state and condition, as it was at the time of the execution thereof; and that the words *after the decease of my sister Ann*, were not erased since the execution of the will by the testator; and therefore, that the respondent ought to be dismissed, and he dismissed her accordingly; and decreed the probate, which the respondent had obtained under the seal of that Court, without the said words, to be delivered out to her, and which probate was delivered out accordingly.

On the 23d of *July*, 1726, the cause was again heard before the Lord Chancellor *King*, upon the Master's report of the 1st of *August*, 1724, and also touching the validity of the devise over of the moiety of the testator's personal estate, bequeathed to the respondent; when his Lordship, *inter alia*, ordered, that the Master should proceed to take the account of the testator's personal estate, which had come to the hands of the appellants or respondent respectively, or to the hands of any other person or persons, for their or either of their use; in the taking of which account, the Master was to make all just allowances: And it was further ordered and decreed, that the surplus of the testator's personal estate, after payment of his debts, legacies and funeral expences, should be divided into moieties; and that the respondent should have one moiety, to her own proper use and benefit; and that the appellants *Nathaniel Stratton* and his wife should join in assigning and transferring the same accordingly: And the said appellants *Nathaniel Stratton* and his wife were immediately to join with the respondent, in transferring a moiety of the *South-sea* stock and annuities, wherein the personal estate chiefly consisted, to such person as the respondent should direct, for her use and benefit; and all parties were to have their costs out of the testator's estate, to be taxed by the Master.

From this decree the appellants appealed; insisting, that the proofs taken in the cause, and particularly the evidence of *Cock*, ought to have been read at the hearing; the same no ways tending

J. Willes.

S. Forster.

1726.

tending to destroy or defeat the will, but being in aid and support of what was evidently the meaning and intention of the testator. That in the present case, it was highly reasonable to admit the evidence of the person who drew the will, and received the instructions for that purpose from the testator's mouth, to explain what the testator meant and intended, by any doubtful expressions made use of by the drawer of the will; and the rather, because it was admitted on all hands, that Cock was no way skilled in the law, but wholly ignorant of the legal construction and operation of the words which he made use of, however certain he was of the testator's intention. That it plainly appeared from the whole tenor of the will, as well as from the proofs in the cause, and particularly from the evidence of Cock, and was even so admitted by the respondent herself, that the testator never intended that she, who was unmarried at the time of making the will, and not likely to have any children if she should marry, by reason of her advanced age, should have the absolute power and disposition of a moiety of his personal estate, which was so very considerable, so as to have it in her power to give the same away to an absolute stranger, in prejudice of his own nephews; but, on the contrary, it plainly appeared to be his intention, that in case the respondent should die, without leaving any child at her death, the said moiety so devised to her for life, should come to and be equally divided amongst all the appellants his nephews. And this being plainly the testator's intention, it was apprehended that this construction ought to have been put upon the words of the will; considering by whom, and in what manner the same was drawn, and the instructions which the testator gave to Cock for that purpose: It was therefore hoped, that the said decree of the 23d of July would be reversed.

P. Yorke.

T. Lutwyche.

On the other side it was contended, that no one principle in law was better known, or more established, than that where a personal estate is given to a man *and the heirs of his body, with remainders over to other persons*, it is an *absolute gift* to the first devisee, and vests the entire property in him, and that the devise over is void. That as this is a known rule in law, so equity always follows the law in this case; and if such a fundamental rule was once to be altered, it would overturn great numbers of decrees and determinations, and no man would know when he was safe in his property. That the present question being only

only concerning a personal estate, it was likewise an established rule, both in law and equity, that it must be determined upon the probate of the will, under the seal of the proper Ecclesiastical Court; which probate had no such words therein as were now pretended by the appellants, neither had the first probate which was granted under the seal of the Archbishop's Court at *Canterbury*, and wherein the appellant *Mary Stratton* joined, any such words. That as to the pretended words themselves, which the appellants would imagine were [*after the decease of my sister Ann*] there was no one could pretend to any certainty, even if the original will was admitted to be read, that those were the words: And the respondent apprehended, there was more reason to suppose that the words were [*after the decease of my sister Mary*] and that the testator finding that those words were inserted afterwards in the will, ordered them to be struck out in that place, where they now appeared to be erased. That as it would be of dangerous tendency, to admit parol evidence to explain the written words of a will; it had been the constant practice of all Courts, both of law and equity, to reject such evidence, and abide by the will itself: And therefore it was hoped, that the decree would appear to be just and well founded, and consequently be affirmed with costs.

1726.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

DECREE affirmed.
Jour. vol. 23.
p. 69.

John Walker, - - - Appellant.

Case 38.

Joseph Gascoigne Nightingale, Esq; Executor of *Robert Gascoigne Nightingale*, who was Executor of *Sir Robert Nightingale*, - - - Respondent.

15th March, 1726.

SIR *Robert Nightingale*, who was many years resident in *East India*, returned to *England* in *August* 1709; and both before and after that time to his death, he employed *Francis Cham-*

Viner, vol. 13.
p. 544. ca. 13.
2 Eq. ab. 161.
ca. 13. 483.
ca. 26.
Cited in both books, by the name of *Walker v. Gascoigne*.

1726.

Chamberlain, Esq; to manage most of his affairs, which Mr. *Chamberlain* did chiefly in his own name; and having dealings with the appellant, he intrusted him with several monies, army debentures, and other things of Sir *Robert's*, for which Mr. *Chamberlain* took notes in his own name, from the appellant, or his servant.

Before Mr. *Chamberlain* had settled any account with Sir *Robert Nightingale*, viz. on the 16th of July, 1722, Sir *Robert* died; having made his will, and thereof appointed *Robert Gascoigne* the respondent's brother, executor; who, pursuant to the direction of such will, took the surname of *Nightingale*, and afterwards died; having made his will, and appointed the respondent executor thereof, who duly proved the same, and also took the surname of *Nightingale*, pursuant to a clause in the same will.

Soon after Sir *Robert's* death, Mr. *Chamberlain* commenced a suit touching the validity of his will in the Prerogative Court of *Canterbury*, against the said *Robert Gascoigne Nightingale*, and after his death, carried on the same against the respondent, until the 5th of February, 1722; when the respondent obtained a definitive sentence against *Chamberlain*, and a confirmation of the probate formerly granted to the said *Robert Gascoigne Nightingale*: After which, the respondent applying to Mr. *Chamberlain* for an account of Sir *Robert's* effects, come to his hands, had three notes delivered him in part of such effects; two of them signed by the appellant, and the other by *David Karver* his servant, which notes were in the following words, viz.

I promise to pay unto Mr. Fran. Chamberlain, or his order, on demand, four hundred pounds. London, May 16, 1709, Value received for self and comp. John Walker.

£ 400.

Received, May 2, 1712, of Captain Edward Arnold, a warrant to clear goods, amounting unto the sum of eight hundred eighty three pounds, eleven shillings, and sixpence, which I promise to be accountable for on demand. John Walker.

£ 883. 11s. 6d.

Received

Received the 6th of June, of Mr. Francis Chamberlain,
one hundred and twelve pounds, five shillings, and nine pence,
in a debenture for Mr. John Walker, per David Karver.

£112. 5s. 9d.

Mr. Chamberlain owned, upon the delivery of these notes, that the money had been often demanded of the appellant, and was not paid; because of several unreasonable demands made on Sir Robert by the appellant, which could not be adjusted. And the respondent afterwards demanding satisfaction for such notes from the appellant, he owned the same were unpaid, but said, Sir Robert owed him more than the monies came to; and being pressed for the particulars of his demands, delivered an account, making Sir Robert's estate debtor to him 1038l. 9s. 6d. whereof 784l. 9s. 6d. was for commission at 3l. per cent. on account of goods of Sir Robert's sold at the East India company's sale; and 200l. more for so much he pretended to have lost, by two bales of muslins he had at those sales bid very high for, and which were therefore left upon his hands.

The appellant refusing to pay the notes, unless he was allowed his demands; and the respondent not being able to bring an action at law in his own name, he, on the 24th of July, 1723, exhibited a bill in Chancery against the appellant and Mr. Chamberlain, for a satisfaction of the money due on these notes. To which bill the appellant put in his answer, and thereby admitted the notes, but insisted, that in 1709, Sir Robert having many muslins and calicoes to dispose of at a public sale, bid the appellant lay aside his other business and apply himself to that sale; promising to allow the appellant, as customary in those cases, full commission for the whole produce of such sale: That the appellant thereupon undertook and went thro' the management of the sale, which amounted in all to 26,149l. 3s. 11d. and his commission at 3l. per cent. to 784l. 9s. 6d. which commission he insisted on, pretending, that by his management of the sale he gained for Sir Robert several thousand pounds, and which he believed no other person would have done; he also insisted on 200l. more, as a loss sustained by two bales of muslin, which he said were sold at the risque and on the account of Sir Robert; and the rest of the 1038l. 9s. 11d. he said was due to him, for wine and linen sold Sir Robert; and that he was willing to account for the monies due on the notes, if the

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respondent will allow his said demands; but because great part of the appellant's acts, and Sir Robert's orders, were of a private nature, and impossible for the appellant to prove but by circumstances; he therefore, if the respondent refused to allow them, insisted on the statute of limitations in bar of the respondent's demands.

On the 27th of *April*, 1724, the appellant brought a cross bill against the respondent and Mr. *Chamberlain*, to be paid the 1038*l.* 9*s.* 6*d.* and also 500*l.* more, pretended to be due to him for managing a sale of other part of Sir Robert's goods by *Chamberlain's* order; and that the said three notes might be delivered up and cancelled. And in this bill, the appellant opened and explained his pretended services; saying, he was, by Sir Robert's order, to raise the price of his goods at the public sales, by bidding upon the buyers thereof, and thereby increase the value of such goods; and that the reason why the appellant was to have 3*l.* per cent. commission was, for that if he out-bid others, he was to pay for the goods, which was very hazardous; and he set forth particularly, that at a sale in 1712, Sir Robert made signs to him to bid on two bales of muslin, which he accordingly did, and lost 200*l.* by them; which loss he also demanded by his bill of the respondent, besides the 784*l.* 9*s.* 6*d.* for commission.

The respondent put in his answer to this cross bill, and on the 16th of *October*, 1724, brought on his original cause to be heard before the Lord Chancellor *Macclesfield*; who decreed the respondent to pay *Chamberlain*, he being only a trustee in the three notes, his costs to be taxed; and that the Master should see what was due from the appellant to the respondent on the said three notes, and compute interest for them, and tax the respondent his costs; and it was further decreed, that the appellant should pay the respondent the said principal money, interest and costs, together with such costs as the respondent should pay *Chamberlain*: But the appellant then making default, this decree as to him, was only unless cause.

The appellant having paid the costs of his default, both causes came to be heard together, before the Lords Commissioners of the Great Seal, on the 2d of *April*, 1725; who were pleased to confirm the former decree, with this variation only, that the

Master should compute interest on the three notes, from the 5th of February, 1722; and also take an account of what Sir Robert Nightingale was indebted to the appellant for wine and linen, and allow the same in the account directed by the former decree; but dismissed the cross bill with costs, declaring, they saw no cause to relieve the appellant therein.

1726.

In pursuance of these decrees the Master made his report, on the 25th of November, 1725, and thereby certified, that after a deduction of 54*l.* allowed the appellant for his wine and linen, there remained 1624*l.* 0*s.* 11*d.* due to the respondent for principal and interest on the notes, and for his costs in the original cause. And this report being afterwards duly confirmed, and the appellant served with a writ of execution of the decree, he paid the respondent the whole money.

But notwithstanding this payment, he soon afterwards appealed from the decree, insisting that the same was erroneous, and ought to be altered and set aside, in the particulars, and for the reasons following: That an allowance ought to have been made to the appellant, for the 784*l.* 9*s.* 6*d.* proved to have become due to him for his commission of 3*l.* per cent. on the sale of goods for Sir Robert Nightingale's account, amounting to the nett produce of 26,149*l.* 3*s.* 10*d.* being the usual and customary commission given to others in all such cases: Or at least, it should have been referred to the Master to settle a proper allowance. That altho' the last dealings between Sir Robert Nightingale and the appellant, were in 1712, and Sir Robert lived till July, 1722, and during all that time they were near neighbours in the country, and the appellant frequently at Sir Robert's house, yet he never demanded the money on any of the said notes; which afforded a strong presumption, that Sir Robert looked upon those notes as satisfied, by the services which the appellant had done him; and it could not reasonably be presumed, that Sir Robert would let such a sum remain so long in the appellant's hands, if he had not been conscious that the same was accounted for and satisfied by those services, for which the appellant never received any other recompence than the money contained in the said notes: And therefore it was conceived, that the appellant's demands ought to have been allowed, or some reasonable compensation made him for his trouble in Sir Robert's affairs; or that both parties should have been

C. Talbot.
T. Lutwyche.

1726.

been left to their respective remedies at law. That the appellant's cross bill had been dismissed with costs, altho' it is the common practice of the Court of Chancery, where there are mutual accounts and dealings between parties, for the defendant in the original cause to exhibit a cross bill, to have a satisfaction of his demands. And the appellant having a just demand upon the respondent, which he refused to allow, as appeared upon the face of his own bill; the cross bill was therefore proper and necessary, as well for a discovery as relief; and ought to have been retained, and the appellant relieved in the manner thereby prayed. That by the decree, the appellant was ordered to pay the respondent not only his own costs, but also the costs which he was to pay the defendant *Chamberlain*; whereas it appeared, both by the respondent's bill and the evidence in the cause, that the appellant was always ready to come to an account with him, on having a just allowance for his services; besides, the appellant was so conscious of the justice of his demand, that he offered to leave it to the determination of any two indifferent persons conversant in the *East India* trade, but which the respondent having refused, he ought not to be allowed costs, if he should be excused from paying costs to the appellant. It was therefore hoped, that the decree would be reversed, the appellant's bill retained, and the money he had paid the respondent restored to him.

P. Yorke.
N. Fazakerley.

On the other side it was contended, that the demands of the appellant, even if he had proved, as he had not, that they were grounded on any promise or agreement of Sir *Robert Nightingale*, were of such a nature, as ought not to have any countenance in a Court of Equity; the services pretended to have been done for Sir *Robert*, being no other than attending for a few days at the public sales where Sir *Robert's* goods were sold, and by a fraudulent underhand contrivance, enhancing the prices of those goods by bidding upon the buyers of them, as if he had been a real buyer himself; and should a Court of equity decree a satisfaction of such demands, it would give sanction to a practice contrary to the faith of public sales, and be an injury to the fair and honest purchaser, and therefore ought to meet with the greatest discouragement. That the appellant having made such an unjust defence, and seeking, by his cross bill, a satisfaction of demands founded upon unfair practices, and being moreover unable to make proof of any promise or agreement of Sir *Robert's*,
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it was but just to dismiss his bill with costs; and tho' he was thereby left to seek his remedy at law, yet it would not have been reasonable to have sent the respondent to law, for recovery of a just and uncontroverted debt, and for which he could not maintain any action in his own name; the notes being taken in the name of Mr. *Chamberlain*, and the respondent only entitled to the benefit of them in equity. The decree therefore being founded on such manifest justice, ought to be affirmed, and the appeal dismissed with costs.

1726.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree, orders and proceedings therein complained of, affirmed: And it was further ORDERED, that the appellant should pay the respondent 100/. for his costs in respect of the said appeal.

DECREE
affirmed.
Jour. vol. 23.
P. 74.

Charles Duke of Grafton, - - Appellant. Case 39.

Thomas Horton, an Infant, - - Respondent.

17th March, 1726.

*P.C. referred to by Lord
Hardwicke in Lord Alber-
genny & Thomas Esq. 12*

THE appellant, upon the death of Catherine, Queen Dowager of England, by virtue of letters patent granted by his Majesty King Charles II. became seised in tail male of the manor of *Potterspury* and *More-end*, parcel of the honour of *Grafton*, in the county of *Northampton*, with remainders over; the reversion in fee being in his Majesty, his heirs and successors. And the Lords or Ladies of this manor for the time being, frequently demised or granted at their will and pleasure, several tenements within the same, by copy of Court roll for three lives, and upon such fines as they thought fit.

1. 1st. 12.
 2. 2. second. 5. 12.
 the note on p.
 15. of 89. 12. 12. 12.
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See Anstruth.
Rep. 659.

Thomas Serjeant, alias Hughes, and Ann his daughter, who had married Thomas Horton, being seised of a messuage and the lands thereto belonging, called Penny Land and Pinfold Land, lying in Yardly Gobion, within the said manor, which had been formerly demised or granted by copy of Court roll for three lives, and one of them being dead; the said Thomas Serjeant

1726.

and *Ann* his daughter, at a Court Baron held for the said manor on the 15th of *February*, 1672, surrendered the said premises into the hands of the Queen; to the intent that the said *Thomas Serjeant* and *Thomas Horton* and *Ann* his wife, might have the same to the use of them for their lives, and the life of the longer liver of them successively, according to the custom of the said manor: And at the same Court, they were admitted tenants accordingly, to hold for the said three lives at the will of the Lord, according to the custom of the manor; by fealty, suit of Court, and the yearly rent of 1*l.* 13*s.* 4*d.* and a fine of 25*l.* was paid for adding the life of the said *Thomas Horton* in the copy.

In *October*, 1675, *Thomas Serjeant* died, whereupon *Thomas Horton* came into possession; and at a Court Baron held for the said manor on the 3d of *August*, 1676, *Horton* and his wife surrendered the premises into the hands of the Queen, to the intent that they and *John* their son, might have the same to the use of them the said *Thomas Horton* and *Ann* his wife, and of *John* their son, for their lives, and the life of the longer liver of them successively, according to the custom of the manor: And at the same Court they were admitted tenants accordingly, and paid a fine of 10*l.* for adding the life of the said *John Horton* in the copy.

Ann Horton died in 1682; in *October*, 1719, *Thomas* her husband died; and *John Horton*, who was the last life in the copy, died in *May*, 1723; upon whose death, the premises reverted and of right belonged to the appellant, as Lord of the manor; and therefore he delivered an ejectment to recover the possession.

In *Trinity* term, 1723, the respondent, as son and heir of the said *John Horton*, exhibited his bill in Chancery against the appellant; stating, *inter alia*, that within the said manor there are, and time immemorial have been, several lands and tenements, held of the Lords and Ladies of the said manor for the time being, by copy of Court roll, which, time out of mind, have been granted or grantable by the said Lords or Ladies, to three persons for their lives, and the life of the survivor of them, successively; upon the surrender, and at the instance or nomination of any tenant or tenants thereof into the hands of the said Lords or Ladies, to the intent, that any three persons in and by

1726.

by such surrender or surrenders nominated, should have the same out of the hands of the said Lords or Ladies; and that such three persons so nominated, have been and ought thereupon to be admitted, or the same to them granted, *paying to the Lords or Ladies of the manor for the time being, a reasonable fine for the same.*—That for time immemorial, by the custom of the said manor, when, and so often as it hath happened, that all the persons named in any such copies have died, without making any new nomination of other person or persons; then the heir or heirs at law of the survivor of such persons, hath nominated, or have right to nominate three persons, to whom the Lords or Ladies of the manor for the time being, have granted such copyhold tenements for the lives of such three persons, and the survivor of them; and they have been accordingly admitted thereto, *paying a reasonable fine for the same, according to the custom of the said manor.*—The respondent then stated, that as heir at law of the said *John Horton*, his father, he had a right to nominate three lives or persons, to whom the premises should be granted; that he had applied to the appellant, to admit three persons to the said premises, for their lives and the life of the longer liver, successively; and that he was ready to nominate three such lives, and to observe the custom of the said manor, and pay the usual fine and fees, heriot and other duties incumbent on him; but, that the appellant had refused to make any such grant or admittance: And therefore the bill prayed, that the appellant might be obliged to admit the respondent and such other two persons as he should nominate, to the said premises, upon his paying the customary fine and fees, and performing such duties and services as were incumbent upon him by the custom of the said manor; and that an injunction might be awarded, to stay the appellant's proceedings at law.

The appellant, by his answer to this bill, insisted that there was not any custom within the manor, whereby, upon the death of any life named in a copy, the Lord of the manor for the time being, was obliged to fill up the same; and that, by law, he was not obliged to renew any copy of any messuages, lands or tenements held of the said manor, otherwise than at his own free election and pleasure; and that he was not compellable to admit any person to be tenant of his manor, upon such surrender as was in the bill suggested; but that such admittance is purely

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purely a discretionary act, at the will of the Lord; because the fine to be paid by every tenant of the manor upon his admittance, was, by the custom of the manor, merely arbitrary and at the will of the Lord or Lady of the manor for the time being.—That there was no such custom as was stated by the bill, touching the heir or heirs at law of a surviving tenant having a right to a new grant; but that in case all the persons named in any copy happened to die, then the estate or estates granted and held by such copy, did revert to the Lord of the manor; and that no new admittances or grants had, at any time, been made in such cases, otherwise than at the will and pleasure of the Lord or Lady of the manor for the time being.

By an order made in the cause on the 10th of May, 1725, after the appellant's answer was put in, it was ordered, that the injunction formerly granted, should be continued till the hearing; and the respondent was, by consent, to account for the rents and profits of the premises, and to deliver possession of the same, as the Court should direct at the hearing of the cause.

The respondent afterwards amended his bill, and thereby varied the custom stated in his original bill; by alledging, that instead of a *reasonable* fine payable upon renewals, the fine was, *one year and an half of the improved rent of the copyhold premises, if insisted upon by the Lords or Ladies of the said manor*, for each and every of such life or lives, or lesser sums, if they thought fit to accept thereof; together with 2s. for a heriot.

The appellant, by his answer to this amended bill, insisted, that the pretended custom therein suggested was not sufficiently certain, nor warranted by the rules required by law, in cases of customs.

After witnesses had been examined, and publication passed, the cause was heard before the Lord Chancellor King, on the 17th of May, 1726; when it was ordered, that a trial should be had at the then next Assizes for the county of Northampton, on the following issues, viz. 1st, Whether the plaintiff Thomas Horton, the son and heir of John Horton, the last life in the copyhold premises in question, had, by the custom of the manor, a right to renew, or redeem the copyhold lands in question, from the Lord of the manor, for three lives. 2dly, If he had such right, whether the right of such redemption or renewal was,

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was, on payment of one year and an half's improved rent for each of the three lives, or on any other terms, and what; and if there were any other terms, they were to be insisted upon, and the jury to indorse the same on the *postea*. And the trial was to be had by a special jury; and after the trial, either side were to be at liberty to resort back to the Court, for further directions; and in the mean time, the injunction was to be continued.

From this order the Duke appealed; and on his behalf it was contended, that the customs insisted on by the respondent's bill, were uncertain, unreasonable, and not warranted by the rules of law. For, by the original bill the respondent insisted, that the custom was, to fill up any copy, or to grant a new copy for three lives, at the instance of the heir of the surviving life, upon paying a *reasonable fine*; but by his amended bill, he charged the custom to be, upon paying *one year and a half of the improved rent*, if insisted on by the Lord for each life, or a sum, if he thought fit to accept of it: And upon the hearing of the cause, the respondent produced and read in evidence, presentment of the homage, at a Court of Survey held for the said manor on the 18th of *April*, 1650, to prove the custom of the manor to be, upon paying a year and a half of the *reserved yearly rent*, for each life upon a renewal, or new grant. But he did not produce, or give so much as a single instance of any of these pretended customs from the Court rolls of the manor, which, upon the death of the Queen Dowager, were delivered to the Auditor of his Majesty's land revenue, and where they all remained; and yet, according to the second issue directed, the respondent was left at liberty to insist at the trial, upon any or any of these pretended customs, or any other custom he could think fit to set up, as the terms of renewal; altho' not in issue in the cause, so that the appellant could not possibly be prepared to make a proper defence thereto upon the trial. That the pretended customs insisted on by the amended bill, were contradictory to the very copies of the Court rolls, under which the respondent derived his title; for, upon adding the case of *Thomas Horton*, his grandfather, in 1672, to the two lives then in being, a fine of 25*l.* was paid; and upon adding the case of *John Horton*, his father, in *August*, 1676, to the two cases then in being, a fine of only 10*l.* was paid; which fully proved,

P. Yorke.

C. Talbot.

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proved, that the fines were arbitrary, and at the will of the Lord: And it appeared by many instances in the Court rolls, in the time of the Queen Dowager, that when any new copy was granted for lives, the same was done by virtue of a particular warrant or precept from the Queen's trustees to the Steward of the manor, and not merely by virtue of his office of Steward. That the respondent had given no instance from the Court rolls, that the homage, upon the death of the last life named in any copy, had presented the heir of the last surviving nominee, or that proclamation had been made for such heir to come in and be admitted; but according to the pretended customs insisted on by the respondent's bill, the Lord was obliged to fill up the copy, upon the death of any life named therein, or to grant a new copy, after all the lives were dead, for three new lives, when and at such time as the copyhold tenant, or the heir of the last surviving nominee should think fit to demand the same, paying one year and a half of the improved rent for each life; and yet the Lord of the manor had no remedy to compel the copyhold tenant, or the heir of the last surviving nominee, to come in and be admitted within any certain time, or otherwise than according to the will and pleasure of such heir; which, with respect to the Lord, seemed to be very unequal and unreasonable. That if these pretended customs were to prevail, they would, in effect, turn copyhold estates for lives into copyholds in fee; and there seemed to be no more reason for such a demand, than there would be against an ecclesiastical person or a college, to make a new lease of freehold lands to an ancient tenant, or his representatives, because the lands had been usually demised for lives. Wherefore it was hoped, that the order would be reversed, and the injunction dissolved; that the respondent would be ordered to account for the rents and profits of the premises in question; and deliver possession thereof to the appellant; and that after such order should be performed, his bill would be dismissed.

T. Lutwyche.

W. Peere
Williams.

On the other side it was argued, that the Court rolls appeared to have been very irregularly kept by the Stewards, and as they were the tenant's evidence, this neglect was a great misfortune to the respondent; and the Steward being appointed by the Lord, it would be very hard, that the tenant's title should be prejudiced by the Lord's officer: However, notwithstanding such negligence, the respondent hoped to prove upon the trial

of the issues, that there were such customs, entitling the tenants and the heir of the surviving tenant to renew, as in the bill were stated. That tho' upon the trial, some customs might appear in favour of the tenant's right of renewal, and in some measure variant from the customs before mentioned; yet the respondent and the other tenants of the manor ought to have the benefit of such customs and right of renewal, upon what terms soever the same had been allowed: And tho' there might be some presentments formerly made at a Court held for the manor, which might vary from the customs already insisted on by the respondent; yet the same were all of them evidence, that the heir of the surviving tenant had some right of renewal subsisting in him, by virtue of the customs, after the death of the three lives, and which ought to be tried upon the present issues. That a trial at law is proper, where the question is upon a custom, there being no other way of trying it but in this manner; for a copyholder has no other remedy to compel an admittance to a copyhold, but by a bill in equity: And therefore to deny this relief, or to deny the trial of the custom of the manor, when there are very few instances to be shewn of such admittances, would be to deny all kind of remedy whatever, and prove a very great hardship to the copyhold tenants of the manor.

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BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order therein complained of should be reversed; and that the injunction should be dissolved: And it was further ORDERED, that the respondent should account for the rents and profits of the premises in question, from the time of his entry thereon; and that he should forthwith deliver possession thereof to the appellant; and that the Court of Chancery should give proper directions for taking the account, pursuant to this judgment. And it was further ORDERED, that the respondent's bill should be dismissed, after the account should be taken, and the money due thereon paid, and possession delivered as before directed.

ORDER
reversed
Jour. vol. 23.
P. 77.

Mary

Cafe 40. *Mary Segrave*, Widow, - - - Appellant.
Dominick Ryan, - - - Respondent.

24th March, 1726.

FRANCIS Segrave, being seised in fee of one third part, and possessed for some long term of years of the other two third parts of the dissolved abbey or monastery of *St. John*, without *Newgate* in the city of *Dublin*; by a memorandum in writing, dated the 19th of *December*, 1687, demised all those the brewhouse, inward and outward dwelling houses, three malt houses, the castle, cellars, and all other the appurtenances and conveniencies, water and water pipes, stables and horse mill, and brewing utensils, (except one room in the back house, over the wainscotted room, and the closet belonging to the same, which the said *Francis* reserved for himself only to live in) unto *Richard Purcell* for 91 years, to commence from the 1st of *May* then next, at the yearly rent of 85*l.* payable half yearly; and the said *Francis Segrave* did thereby covenant, before the 1st of *February* then next, to make a good and sufficient lease, according to law, to the said *Richard Purcell* of the premises, as they were formerly held by *William Brook* and *Thomas Newland*; but *Henrick's* malt house and *Newland's* dwelling house were to be excepted out of the lease.

When *Purcell* came to take possession of the demised premises, he found some parts thereof had before been let to several persons by prior leases, which were not then expired; and particularly, some rooms in a part of *Brook's* dwelling house, known by the name of the *Three Kings*, wherein one *Brian Callan* afterwards lived: But *Segrave*, on application made to him, agreed that *Purcell* should have an allowance in his rent for those rooms, and such other parts of the premises as were detained from him, until he should be let into possession thereof; and, to make *Purcell* the more easy, *Segrave* agreed to give up the room and closet which he had reserved for his own use.

In the year 1689, *Segrave* and *Purcell* came to an account; when *Purcell* insisted on having an allowance or abatement in his rent, for such part of the demised premises as was so detained from

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from him; and thereupon Mr. *Segrave* agreed to accept of 70*l.* per ann. in lieu of the 85*l.* per ann. reserved by the demise; and accordingly, on *Purcell's* paying him 35*l.* he gave him an acquittance in full for half a year's rent, which became due the 1st of *November* then last. *Purcell* continued to pay his rent according to this abatement, till about the year 1692, and tho' *Segrave* lived till 1709, he never demanded the room or closet reserved for his own use; but in the said year 1692, one *Nuttall*, who had an incumbrance on the premises, prior to the lease of 1687, insisted, that he was entitled to receive 80*l.* per ann. and threatened to compel payment thereof by distress; whereupon *Purcell* applied to Mr. *Segrave* to be indemnified, but without effect, so that *Purcell* was, for a considerable time, obliged to pay *Nuttall* 80*l.* yearly, notwithstanding the above agreement for an abatement of 15*l.* per ann.

In 1711, *Richard Purcell* died; having made his will, and thereof appointed his wife *Margaret Purcell* sole executrix and residuary legatee; and she having proved the will, died in 1716, having made her will, whereby she devised the benefit of the said lease to the respondent; who, by virtue thereof, became entitled to the premises for the remainder of the 91 years term.

That part of the premises called the *Three Kings*, being in a ruinous condition, the said *Bryan Callan* the tenant quitted the possession; whereupon the respondent, on the 15th of *April*, 1717, peaceably entered and possessed himself thereof, by virtue of the lease made by *Segrave* to *Purcell*, and expended about 30*l.* in repairing the same.

On the 10th of *May*, 1723, the appellant exhibited her bill in the Court of Chancery in *Ireland*, against the respondent and others; setting forth, that the said *Francis Segrave*, her late husband, being seised of the said dissolved monastery, whereof the house called the *Three Kings* was part, did, by indenture of lease, demise all the premises to *Thady Mahony* for 41 years; and that *Mahony*, by indenture dated the 13th of *November*, 1710, *Segrave* being then dead, declared, that the said lease was made to him in trust for the appellant; that she being so entitled, by deed, dated the 24th of *April*, 1714, demised the said house called the *Three Kings*, to *Bryan Callan* for three years, at the yearly rent of 14*l.*; and that *Callan* covenanted

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to deliver the appellant possession thereof at the end of the said term; that *Callan*, some short time before the expiration of his lease, assigned his interest to the respondent, who entered and kept possession of the said house, on pretence that the same was comprised in the lease made to *Purcell* by *Segrave*: And tho' the appellant by her said bill confessed, it was then too late for her to apply to the Court for an injunction to be quieted in the possession, as against a tenant holding over his term; yet, she thereby pretended, that she was entitled to a specific execution of the covenants contained in *Callan's* lease, against the respondent, as assignee of *Callan*, and ought to have an account and be let into possession; and the rather, for that she had only an equitable title, the legal estate being in *Mahony* her trustee, and therefore she prayed to be restored to the possession by the injunction of the Court, and to have an account of the rents of the house: But, tho' she made *Mahony* a defendant to her bill, yet, she did not think fit to bring him to a hearing.

The respondent, by his answer to this bill insisted, that if any such lease was made to *Mahony*, the same was void, for that *Segrave* had no power to make any such lease, the premises having been long before demised by him to *Purcell*, and also mortgaged by him and the appellant to one *Smith*, which mortgage was then subsisting; he denied that *Callan* ever assigned his interest to him, or that he was to give him any consideration for the same, or for quitting the possession; but said, that the house being extremely out of repair, and *Callan* inclined to quit it, and he having a right thereto under the demise made by *Segrave* to *Purcell* in 1687, he, by virtue thereof, and not of *Callan's* pretended lease, entered peaceably and possessed himself of the house, and insisted he had good right to hold the same against the appellant, till evicted by due course of law.

Issue being joined, witnesses examined, and publication duly passed, the cause was heard on the 30th of April, 1724, when the Lord Chancellor of Ireland was pleased to direct the following issue to be tried at law, viz. "Whether the house called
" the *Three Kings*, was part of the premises demised, or in-
" tended to be demised, by the lease made by *Francis Segrave*
" to *Richard Purcell* the 19th of December, 1687."

Upon

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Upon the appellant's petition, the cause was reheard on the 18th of *June* following; when the appellant's counsel insisted, that she had no legal title to recover at law, she being out of possession; and offered, in case she was restored to the possession, that she would admit the respondent's title under the lease to *Purcell*, and would set up no temporary bars: Whereupon his Lordship thought fit to vary the former order, and to direct that an injunction should be awarded, to restore the appellant to, and from time to time, quiet her and her under-tenants in the possession of the said house called the *Three Kings*, to continue till further order: That she should appear to an ejectment, to be brought in the King's Bench by the respondent, and allow his title under the lease made by *Segrave* to *Purcell* in 1687, for such houses as were mentioned therein, and not set up any temporary bars, or insist on the length of time; and that the cause should be tried at the Sittings of *Nisi prius*, after the then next term, by a jury to be struck by one of the Masters in Chancery.

On the 1st of *December*, 1724, the cause was accordingly tried, after a view, before the Lord Chief Justice *Whitshed*; and the respondent having fully proved, by the testimony of several unexceptionable witnesses, that the said house called the *Three Kings*, was part of the outward dwelling house mentioned in the lease made to *Purcell*; that it had been built by *Brooke*, and enjoyed by him and his under-tenants for many years, under a lease made to him by Mr. *Segrave*, prior to *Purcell's* lease; and that it was not either of the two houses excepted in *Purcell's* lease; a verdict was given for the respondent, and he was afterwards put into possession.

The appellant therefore appealed from the decree; insisting, that she ought not to have been thereby deprived of the legal advantage she had, under the long and quiet possession of the house by the tenants of herself and her late husband; the respondent having no bill, nor any equity to be a foundation for such a direction: That as the Court had allowed the appellant's right to the possession of this house, by ordering it to be restored and continued by injunction; it was improper to direct any trial at law, by which means the appellant had been stripped of her possession. That the appellant, by being enjoined not to insist on any temporary bar, or the length of time, could not

C. Talbot:
N. Fazakerley.

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not give any evidence thereof upon the trial; which it was apprehended would have been very proper evidence, to explain the general words of the lease made in 1687, and to shew that the house in question was never intended to pass by that lease, the possession having ever since gone contrary to it. That the Court had made no reservation of further directions after the trial should be had; which, if it was proper to have directed any trial, ought likewise to have been directed: Nor was the respondent decreed to account with the appellant for the profits of the house: And therefore it was prayed, that the decree might be reversed, the verdict set aside, and the appellant restored to the possession.

P. Yorke.

T. Lutwyche.

On the other side it was said, that the decree was made at the importunity of the appellant's own counsel, and upon the terms proposed by them to the Court; she was, in that respect therefore, greatly indulged, for the respondent having entered on a vacant possession, and under a title still subsisting, he ought to have been continued in such possession, until legally evicted. That the respondent had more reason to complain than the appellant, inasmuch as an injunction had been awarded for restoring her to the possession, when she should have been left to her legal remedy; and the rather, for that the only colour she had for seeking relief in equity was, that *Mahony*, her trustee, would not permit his name to be made use of in any action at law; and yet she did not think fit to bring him before the Court at the hearing, tho' she had made him a defendant to her bill; nor was it pretended, that the mortgage to *Smith* was prior in point of time to *Mahony's* lease. That the length of time could not have been of any avail to the appellant, because the respondent had seven years recent possession; and the appellant was not debarred by the decree, from insisting on any thing which could have served to satisfy the jury, that the house called the *Three Kings* was a distinct, separate holding, and no part of the premises demised by the lease to *Purcell*; but, by the alteration of the possession, and by the respondent's being made lessor in the ejectment, the whole burthen of proof was put upon him; and yet notwithstanding this difficulty, he fully verified his title and obtained a verdict, after a view and upon full evidence. It was therefore hoped, that the decree would be affirmed, and the appellant's bill dismissed with costs.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order therein complained of, should be affirmed; with this variation, "That whereas the respondent, "since the said order, had recovered judgment in ejectment and "possession, it is hereby declared, that the appellant is at "liberty to bring an ejectment in her own name, or her trustee, in order to recover possession of the premises in question; "but the respondent to continue in possession in the mean "time; and that the respondent shall not set up any mortgage "in bar of the appellant's title."

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ORDER affirmed, with a variation, Jour. vol. 23. p. 86.

Sarah Meynell, Widow and Administratrix of *Lawrence Crabb* her first Husband, and also Widow and Relict of *Richard Meynell* her second Husband, and *Isaac Crabb*, eldest Son of the said *Lawrence* and *Sarah*, - - - Appellants.

Case 41.

George Moore, - - - Respondent.

27th March, 1727.

LAURENCE *Crabb* in 1690, went to the island of *Barbadoes*, and there intermarried with the appellant *Sarah*, who was one of the three daughters and coheirs of *George Fletcher* of that island.

The said *George Fletcher* died seised in fee of five messuages and one acre of land, with several negroes, and other live and dead stock in *Barbadoes*, of 470*l.* per ann.; and also of a plantation, messuages and lands, with several negroes, and other live and dead stock in the island of *Antigua*; which, on his death, descended upon his three daughters; and two of them soon after dying without issue, the appellant *Sarah* became thereupon entitled to the reversion of all the said premises, expectant on the death of her mother, the widow of the said *George Fletcher*, and who afterwards intermarried with *Francis Young*.

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Lawrence Crabb carried the appellant *Sarah* to *Jamaica* with him, and in 1691, embarked from thence for *England*; but in their passage, the ship and all her cargo was lost, they themselves narrowly escaping; and *Crabb* being in mean circumstances, the appellant *Sarah's* mother, in regard to his necessities, surrendered the plantation and premises in *Antigua*, to the appellant *Sarah*; who, in 1695, went with her husband to *Antigua*, and took possession thereof; but finding the plantation unprovided with a sufficient stock and in want of several necessities, *Crabb* wrote to his correspondents in *England*, to send him coppers and other things necessary for the same; but not being able to procure any supply from them, and being by reason of his very low circumstances unable to procure the same himself, he and the appellant *Sarah* went to *Barbadoes*, to persuade her mother to agree that the appellant *Sarah's* estate there, which she was entitled to after her mother's death, might be sold, and the money arising therefrom applied in erecting proper buildings upon, and to supply and stock the plantation in *Antigua*: This the mother at first declined; but at last she consented to such sale, on *Crabb's* agreeing, that the money arising therefrom should be employed in supplying and stocking the *Antigua* plantation, and that then the buildings, negroes and stock thereon, together with the plantation itself, should be settled upon the appellant *Sarah* and her issue.

The *Barbadoes* estate was accordingly sold, and the money arising by such sale laid out in supplying and stocking the *Antigua* estate with the necessary works, negroes and cattle; and according to the said agreement, *Crabb* and the appellant *Sarah* by indenture dated the 10th of *April*, 1699, in consideration of 1200*l.* conveyed to *Thomas Lasher*, his heirs and assigns, all the said plantation in *Antigua*, together with all the houses, out-houses, cattle, mills, edifices, and buildings thereon; and all coppers, stills, worms, utensils and other things whatsoever thereunto belonging; and also sixty seven negro slaves, with their increase, together with thirty five neat, able working cattle, and their increase, &c. *Habend'* to the said *Thomas Lasher*, his heirs and assigns, for ever: Who by indenture dated the 15th of the same month, for the like consideration, conveyed the said plantation and premises back again to *Lawrence Crabb* and the appellant *Sarah*, their heirs and assigns; *habend'* to them, their heirs and assigns, to the uses, intents and purposes

poses following, viz. To the use of *Lawrence Crabb* and the appellant *Sarah*, for their lives and the life of the survivor; remainder to the use of the children of the appellant *Sarah* in fee; subject nevertheless to the payment of such portions and legacies, as the appellant *Sarah* should by her will appoint. And these deeds were duly recorded in *Antigua*, according to the laws of that island.

After this transaction, the appellant *Sarah* and her husband *Crabb* came to *England*, where they stayed till 1708, and were very conversant with the respondent; who during all that time never made any demand upon them, until they had actually agreed for their passage back to *Antigua*, and put on board divers goods and merchandize and were ready to go on board themselves; and then, when there was no time left to settle or look into accounts, the respondent arrested *Crabb*, and would not discharge him till he had given bond for 2500*l.* principal money, wherein the appellant *Sarah* was made to join.

In *March*, 1709, *Lawrence Crabb* died intestate at *Antigua*, leaving the appellant *Sarah* his widow, and the appellant *Isaac* their eldest son, about 16 years old, and six other children; but he left no real estate whatever behind him, save what was so settled as afore said: Whereupon the Governor of the island, as ordinary, appointed Colonel *Codrington* and others to inventory and appraise his personal estate, who did accordingly truly inventory and appraise at their full value, all the intestate's personal estate, save only four negroes of his purchase, which were wholly unprofitable, and rather a charge than a benefit to the plantation, and three sucking children reckoned of no value, which were therefore omitted; the value of which personal estate, as so appraised, amounted to 440*l.*

Soon after *Crabb's* death, the appellant *Sarah* intermarried with *Richard Meynell* her second husband; whereupon one *Joshua Redbead* brought his action and recovered judgment against the appellant *Sarah* and the said *Richard Meynell*, for 484*l.* 1*s.* 4*d.* and *Isaac Ryall*, in like manner recovered judgment against them for 66*l.* These two sums the appellant *Sarah* and *Meynell* actually paid; and the appellant *Sarah*, during her widowhood, also paid 137*l.* 7*s.* 1*d.* for the funeral expences of *Lawrence Crabb*, and several other of his debts; so that she actually paid in

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in discharge of the intestate's debts 150*l.* and upwards, beyond the amount of his assets.

In *Michaelmas* term, 1716, the respondent preferred his bill in the Court of Chancery against the appellants and the said *Richard Meynell*, setting forth, that by indenture dated the 1st of *November*, 1692, from *Lawrence Crabb* and the appellant *Sarah* to the respondent, and by a fine levied pursuant thereto, they conveyed to the respondent and his heirs, all the said premisses in *Barbadoes* and *Antigua*, together with all the negro slaves and plantation utensils, and all the appellant's estate in the said island; in trust for the appellant *Sarah* for her life, and after her death for the said *Lawrence* for his life; and after both their deaths, then as to one moiety, in trust for the heirs of the body of the appellant *Sarah*, and for want of such issue, to the appellant *Sarah* in fee; and as to the other moiety, in trust for the said *Lawrence Crabb*, and his heirs for ever; and that this deed and fine were duly registered in *Barbadoes* and *Antigua*. — That in 1706, *Lawrence Crabb* and the appellant *Sarah*, became bound to the respondent in a bond of 5000*l.* penalty, conditioned for payment of 2500*l.* by annual instalments of 200*l.* That *Crabb* was further indebted to him by another bond, dated the 5th of *May*, 1708, in 218*l.* 4*s.* 6*d.* and in near 7000*l.* above the principal and interest due on those two bonds; and therefore prayed, that the appellant *Sarah*, and her then husband *Richard Meynell*, might account with the respondent for *Lawrence Crabb's* personal estate, and pay what was due to him for principal and interest; and in case such personal estate was not sufficient, that the reversion of the moiety of the premisses in *Barbadoes* and *Antigua*, expectant on the appellant *Sarah's* death, and all other the said *Lawrence Crabb's* real estate of which he died seised, might be sold, and the respondent thereout paid his said debts with interest.

To this bill the appellant *Sarah*, being in *England*, answered alone, her husband *Meynell* being then in *Antigua*; and by her answer insisted, *inter alia*, that the conveyance of *November*, 1692, and the fine set up by the respondent, if any such there were, were executed and levied by her during her infancy and coverture, and were not registered and recorded in the proper offices in *Antigua*, as several acts of that island direct; and that for want of such registry, the same could not operate upon, or bind

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bind any estate there: She further insisted, that the bond for 2500*l.* was, as to her, void, she being then a feme covert, and entering into the same under the coercion of her husband; that the buildings, works, negroes and cattle on the said plantation, at *Lawrence Crabb's* death, save only twelve negroes and three children, were part of, or the produce and increase of those left her by her father, or erected and purchased by the monies arising out of her and her mother's estate in *Barbadoes*, and other negroes that came to her on her mother's death; and that no part of the said buildings or works were erected, or any part of the said negroes or cattle bought at the expence, or with the money of *Lawrence Crabb*, save only the said twelve negroes and three children; that he never had money of his own to purchase the same with, and that he never did, or could lay out any money in erecting works, or replenishing the plantation at *Antigua* with fresh stock, or any other necessaries; and therefore she insisted, that she was entitled to the same, together with the plantation for her and her children's benefit, freed and exempted from the debts of the said *Lawrence Crabb*; and she further insisted, that several consignments had been made to the respondent, in discharge of what was due to him.

Issue being joined, and witnesses examined on both sides, the cause was heard before the Lord Chancellor *Macclesfield*, on the 8th of May, 1719; when his Lordship declared, *inter alia*, that as to the real estate of the appellant *Sarah*, of which a fine was levied and a conveyance, as to one moiety thereof, made to *Lawrence Crabb* her former husband; it appeared, that by the laws of *Antigua*, all deeds relating to estates within that island, must be registered there, to make them effectual; and that the deed of settlement under which the respondent claimed to make one moiety of the estate liable to his demands, not being registered there, as the said laws required, was thereby become void; and did therefore order, that the respondent's bill, as to such part thereof as sought to make a moiety of the real estate liable to his demands, should stand dismissed; but as to the personal estate of *Lawrence Crabb*, his Lordship ordered and decreed, that the appellant *Sarah* should come to an account for the same before the Master, who in taking the account, was to make the appellant all just allowances; and the Master was also to take an account, and see what *Lawrence Crabb* was indebted to the respondent, and what the respondent

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had received towards satisfaction thereof; and what the Master should find and certify to be due to the respondent from the said *Lawrence Crabb*, over and above what he had received towards satisfaction thereof, it was ordered and decreed, that the same should be paid the respondent out of the estate of the said *Lawrence Crabb*, which should appear to be remaining in the appellant's hands, after all just allowances made her; and the consideration of costs was reserved till after the Master's report.

On the 1st of *August*, 1723, the Master made his report, and thereby certified, that he found by the proofs in the cause, and the appellant *Sarah's* answer, that *Lawrence Crabb* died possessed of a personal estate, consisting of several negroes, buildings, cattle, household stuff and other things, the particulars and value whereof he annexed to his report by way of schedule, amounting to 4050*l.* 7*s.* 6*d.* *Antigua* money; and that the same, upon his death, came to the hands of the appellant *Sarah*; and which 4050*l.* 7*s.* 6*d.* was at the time of *Lawrence Crabb's* death in value 2700*l.* 5*s.* sterling, whereout the Master had allowed the appellant 37*l.* sterling for funeral charges, which being deducted out of the 2700*l.* 5*s.* there remained of the assets of *Crabb* come to the appellant's hands 2663*l.* 5*s.* And the Master further certified, that he found due to the respondent from *Crabb*, on two bonds, and for interest due thereon to the 25th of *June*, 1723, and by money paid by the respondent for *Crabb's* use and by his order, several sums which he particularly mentioned in the second schedule to his report, amounting to 4416*l.* 15*s.* 2*d.* but the respondent having admitted before the Master to have received of *Crabb*, in his life-time, and by goods consigned by him to the respondent, and which came to the respondent's hands after *Crabb's* death, 288*l.* 12*s.* 9*d.* the particulars whereof he set out by way of third schedule to his report, which being deducted out of the said 4416*l.* 15*s.* 2*d.* there then remained due to the respondent on the 25th day of *June*, 1723, 4128*l.* 2*s.* 5*d.*

To this report the appellants took several exceptions; the first of which was, For that the Master had in the first schedule to his report, charged the appellant with the several matters and things following, as part of the personal estate of *Lawrence Crabb*; whereas by the laws and customs of the island of *Antigua*, the

the same belonged to and were part of the freehold and inheritance of the appellants, and ought to go along with the same, being by the decree and by the settlements therein recited, discharged from the respondent's demands; viz.

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£. s. d.		£. s. d.	
A wind mill erected, - -	600 0 0	Two large stills, two	} 130 0 0
Seven large coppers, - -	200 0 0	worms, and two worm	
Thirty four working cattle	} 480 0 0	tubs, - - -	
at 20 l. per head, - -			
A cattle mill, a curing	} 200 0 0	Sixty eight negroes at	} 1360 0 0
house, boiling house and		20 l. each, one with the	
still house, - - -		other, - - -	

And in which two last particulars, there was an overcharge both as to the number and value.

The third exception was, For that the Master had not allowed the appellant *Sarah* the sum of 484 l. 1 s. 4 d. being a debt due from *Lawrence Crabb* to *Joshua Redhead*, and for which he recovered a judgment at law against her and her late husband *Meynell*; nor the sum of 66 l. paid to *Isaac Ryall*, in satisfaction of so much due from *Crabb*, and for which *Ryall* also recovered judgment at law against the appellant and her said husband *Meynell*, both which sums ought to have been allowed the appellant.

And the fourth exception was, For that the Master had not, but ought to have allowed the appellant *Sarah* the sum of 137 l. 7 s. 1 d. it appearing from the proofs that she paid so much for the funeral expences of *Lawrence Crabb* and for mourning for his family.

On the 18th of *April*, 1724, these exceptions were argued before the Lord Chancellor *King*; when his Lordship was pleased to over-rule them all, and confirm the Master's report *in toto*.

The appellants therefore appealed from this order, and on their behalf it was argued, that the buildings, works, coppers, stills, &c. mentioned in the first exception, were the freehold of the appellant *Sarah*, and part of, or belonging to her plantation, as to which, the respondent's bill was dismissed; and that the same, together with the negroes and cattle in this exception

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exception also mentioned, were fully proved in the cause either to have been left the appellant *Sarah* by her father, or to have been erected and bought in with the monies raised by sale of other part of her real estate, and annexed to her plantation in *Antigua* subject to a trust to her for her life, and afterwards for the benefit of her children; according to the agreements entered into for that purpose, previous to the sale of the *Barbadoes* estate. Besides, it was no where proved, that any of these negroes, cattle or stock, were bought by *Lawrence Crabb*; on the contrary, it was fully in proof, that he never was in circumstances sufficient to purchase the same. Should it be objected, that by an act of assembly passed in *Antigua*, it is enacted, “ That in case any person or persons, tenants for life or will, “ shall erect or put up any work, such as mills, coppers, or “ stills, for the improving his interest, all heir or heirs, or “ his or their representatives, shall pay the value of such mills “ or coppers, at appraisements, in twelve months; any law or “ usage to the contrary notwithstanding:” — That under this act, the buildings and works in question, were to be considered as personal estate of *Lawrence Crabb*: That negroes and cattle, though real estate to all other purposes, were personal estate as to the payment of debts; and that therefore, the report and order appealed from were right in these particulars. It might be answered, that this act was not passed until the 18th of *June*, 1702, whereas it was fully in proof, that all the works in question were erected prior to that time, and the act had no retrospect whatsoever; but if it had, it only extended to mills and coppers erected or put up at the proper expence of the persons erecting them; but in the present case, the works were erected and put up at the expence of the appellant *Sarah* and her mother, being paid for out of the money arising from the sale of their real estate in *Barbadoes*; and therefore no part of *Lawrence Crabb's* estate. As to the third exception, it was insisted, that the appellant *Sarah* ought to have been allowed the two sums therein mentioned, as being so much really paid by her and her husband *Meynell*, out of the assets of *Lawrence Crabb*, in discharge and satisfaction of debts really due from him, and having been actually recovered from her by due course of law, as his administratrix; and therefore the same ought to have been considered as included in the just allowances, which by the decree were directed to be made. But should it be objected that these being simple contract debts, were of an inferior

inferior nature to the respondent's, and that the appellant *Sarah* ought not to have applied her intestate's assets in discharge of them, until all debts of a superior nature were first satisfied; it was answered, that these sums were recovered by due course of law, the respective creditors having duly obtained judgments for the same, as was fully proved by the respondent's own witnesses. Besides, the appellant *Sarah* could not give the respondent's bonds in evidence in *Antigua*, so as to prevent these judgments being obtained against her; and therefore she ought to be allowed whatever she had been obliged to pay under such circumstances. And as to the fourth exception, the appellant ought surely to be allowed the whole of the money herein mentioned, the same having been actually expended by her in and about the funeral of her husband *Lawrence Crabb*, and was but suitable to his condition; he being at the time of his death a member of the council of *Antigua*. It was therefore hoped, that the order appealed from would be reversed, and the exceptions allowed.

On the other side it was contended, that the goods and things mentioned in the first exception, were by the laws and customs of *Antigua*, subject and liable to the payment of debts; and that they were made, erected, found and provided by *Lawrence Crabb*, during his intermarriage with the appellant *Sarah*, he being by virtue of such marriage, and of his having issue by her, tenant for life of the plantation; consequently, they were part of the stock and utensils provided by him, and ought to be considered as part of his estate for the payment of his debts. That these effects were not discharged from the respondent's demands, either by the decree made in the cause, or by the settlements therein recited; such settlements being voluntary, and made after marriage: For by an act of assembly made at *Antigua*, on the 21st of July, 1692, it is enacted, "That all negroe and other slaves after the date of that act, should be inheritance and affixed to the freehold, and the widow capable of being endowed thereof; provided always, that any executor or administrator might inventory the said negroes, but not take them into his custody; to the intent, that if there should not be sufficient goods and chattels to pay the deceased's debts, then the said negroes were liable to be taken for payment of such debts, and be chattels for that purpose and not otherwise." That the debt of 484*l.* 1*s.* 1*d.* due from *Lawrence Crabb* to *Redhead*, and the other debt of 66*l.* due to

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Ryall, were due on simple contract only, and so ought not to have been paid in a due course of administration, before debts by specialty and of a superior nature; the payment therefore of such debts by the appellant *Sarah* was a misapplication of her husband's assets, for which she ought to be accountable. That as *Lawrence Crabb*, according to the allegation of the appellant *Sarah*, died insolvent, there was no manner of reason to allow her 137*l.* 7*s.* 1*d.* $\frac{1}{2}$ for his funeral and her mourning, to the loss and prejudice of his just creditors: And that she had the less reason to complain of not having a sufficient allowance for her husband's funeral, when the Master had actually allowed her 37*l.* on that account, which was more than he ought to have done. And therefore it was conceived, that the order made on arguing the exceptions, was just, and according to the rules of equity, and would consequently be affirmed with costs.

ORDER
reversed
in art.

Jour. vol. 23.
p. 88.

AFTER hearing counsel on this appeal, it was ORDERED, and ADJUDGED, that so much of the order complained of as overruled the appellant's third exception, should be reversed; and that the said exception should be allowed; and that the Master's report should be varied according to this judgment: And it was further ORDERED and ADJUDGED, that the said order, as to the appellant's other exceptions, should be affirmed.

Case 42. *James Noke*, Executor of *Judith Med-* } Appellant.
licot, Widow, - - -

Richard Darby and *Selwyn* his Wife, } Respondents.
late *Selwyn Samber*, - - -

14th April, 1727.

Viner, vol. 11.
p. 172. ca. 53.
2 Eq. ca. ab.
300. ca. 30.

JUDITH *Medlicot*, being seised in fee of several freehold and copyhold lands and hereditaments in *Sussex*, and entitled to the remainder of certain leases of houses in *Watling-street*, *London*, for a long term of years, expectant upon the death of Dame *Mary Selwyn*, widow; and being also possessed of a very considerable personal estate, duly made her will, dated the 29th of *September*, 1707, and thereby, *inter alia*, devised

devised as follows, “ *Item*, I give unto the said *Selwyn Samber*,
 “ the sum of 100*l.* sterling, to be paid her at her age of 21
 “ years, or day of her marriage, which shall first happen.
 “ *Item*, I give unto the aforesaid *Selwyn Samber*, one small
 “ silver tankard worked round with ridges like hoops. *Item*,
 “ If it shall happen that the said Lady *Mary Selwyn*, my late
 “ brother’s widow, shall depart this life before the expiration
 “ of the leases of the two houses in *Watling-street, London*,
 “ the remainder of the said terms of or in the said leases will
 “ be vested in me, or my executor; and therefore, I do hereby
 “ give and bequeath all my right, title and interest of, in and
 “ to the said leases and houses, unto my aforesaid nephew *James*
 “ *Noke* and my God-daughter *Selwyn Samber*; and her part
 “ and proportion to be applied towards her better maintenance
 “ and education. And to the intent all my debts, legacies and
 “ funeral expences may be justly and honestly satisfied and
 “ paid, I give and devise all that my moiety, part, purpart and
 “ share of all that my mansion-house called *Bechington*, in the
 “ parish of *Friston*, and also of all that the manor of *Peak Dean*,
 “ alias *Peaktben*, and also of all the freehold messuages, lands,
 “ tenements, hereditaments and appurtenances whatsoever,
 “ within the several parishes of *Friston, Eastdean, Eastborn, Wil-*
 “ *lingdon, Pevensey, Westham, Hailsham, Falkington and Jeving-*
 “ *ton*, or elsewhere, in the county of *Suffex*, called or known
 “ by the several name or names of *Bechington, Friston, Peak*
 “ *Dean, Eastlees, Hobney*, late *Baldeys, East Skeens, the Monts,*
 “ and *Studley’s* lands, or by whatsoever other name or names
 “ the same, or any part thereof, are or is called or known, and
 “ also all my estate, interest, right, title, property, claim and
 “ demand whatsoever, of, in and to the same, or any part
 “ thereof; and also all that my moiety of the wind mill, called
 “ *Friston* mill, and all those my two acres of copyhold land,
 “ lying in *Friston*, holden of the manor of *Wilmington*, and all
 “ other my freehold and copyhold messuages, lands and tene-
 “ ments whatsoever, not herein before given away, nor disposed
 “ of, with their and every of their appurtenances, unto my
 “ loving friends, *Nicholas Gilbert* of *Eastborn*, in the county
 “ of *Suffex*, gentleman, and *Thomas Willard* of the same place,
 “ gentleman, and to the survivor of them and his heirs; in
 “ trust that they, and the survivor of them and his heirs, shall
 “ and do within two years next after my death, sell and dispose
 “ of

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of all the said premisses before to them devised, for the best
 “ price they can get for the same, and with the money raised
 “ by sale thereof, first pay all my debts, legacies, funeral and
 “ other expences, which they shall be at, in and about my
 “ funeral, and selling of the said estate, and the overplus of the
 “ said monies remaining in their hands, after such my debts,
 “ legacies, funeral and other expences whatsoever, be paid and
 “ discharged, I give and bequeath unto my aforesaid nephew
 “ *James Noke*, to the intent and purpose, he shall purchase
 “ my moiety of *Friston, Peak Dean* and the *Monts*, and come
 “ and inhabit at *Friston*; and when he marries, if he have issue,
 “ shall have his son baptized by the name of *Selwyn*, as I also
 “ desire his other children may be, in memory of that ancient
 “ family. And my will is, that if my aforesaid nephew *James*
 “ *Noke* shall refuse or neglect to purchase the aforesaid moiety
 “ of *Friston, Peak Dean* and the *Monts*, within one year next
 “ after my death, that then he shall not have the overplus
 “ money remaining in my said trustees hands, after sale of the
 “ estate and payment of my debts, legacies and other expences
 “ as aforesaid; but such overplus monies shall be equally
 “ divided between him the said *James Noke*, his brother *Charles*
 “ *Noke*, my niece *Penelope Samber*, and *Selwyn Samber* her
 “ daughter, share and share alike. All the rest and residue of
 “ my goods, chattels, money, plate and personal estate what-
 “ soever, not herein before given away, nor disposed of, (my
 “ debts, legacies, funeral and other expences being first paid
 “ and discharged) I give and bequeath unto my aforesaid nephew
 “ *James Noke* ;” whom the testatrix made sole executor of her
 will, and desired him to be very kind to, and take care of the
 said *Selwyn Samber*, and be assisting to her in managing the
 estate which she should leave her, and that she should have the
 rents and profits thereof duly paid and applied towards her
 maintenance and education. And the testatrix, before the pub-
 lication of her will, desired the said *Selwyn Samber* should have
 a gold seal.

On the 12th of *February*, 1707, the testatrix died; and there-
 upon the appellant proved the will, and possessed himself of the
 personal estate of the testatrix, more than sufficient to pay her
 debts, legacies and funerals; and he and the trustees, *Gilbert*
 and *Willard*, entered upon the trust estate, and received the rents
 and profits thereof.

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In Hilary term, 1721, *Penelope Samber*, mother of the respondent *Selwyn*, to whom several pecuniary and specific legacies were devised by the said will, over and above her contingent share of the overplus of the trust estate, and also the respondent *Selwyn*, then an infant, exhibited their bill in the Court of Exchequer, against the appellant and *Thomas Willard*, *Thomas Medly*, *Robert Baylis* and *Jasper Webb*; for an account of the testatrix's personal estate, and that the same might be made liable to her debts, legacies and funeral expences; that the trust estate might be sold, and that the respondent *Selwyn's* share of the surplus of the purchase money might be paid, together with her other legacies.

The appellant put in his answer to this bill, and thereby set forth an indenture, dated the 26th of *November*, 1709, whereby the plaintiff *Penelope* and *Charles Samber* her husband agreed to release all their title to the share of the surplus, after sale of the trust estate, and also to the respondent *Selwyn's* share, in case she should die before age or marriage; and an indenture tripartite, dated the 2d of *December*, 1709, made between *Gilbert* and *Willard*, the trustees, of the first part, the appellant and *Abigail Stevens*, and *William Snatt* and his wife, the said *Charles Samber* and *Penelope* his wife, of the second part, and the defendant *Medly* of the third part; reciting, *inter alia*, that *Medly* had a mortgage on the trust estate to the value of 1785*l.* and had paid 831*l.* 5*s.* 2*d.* for debts and legacies, and 105*l.* 6*s.* 8*d.* for obtaining a decree of the Court of Chancery therein mentioned, and had undertaken to pay the respondent *Selwyn* her 100*l.* at her age or marriage, and to pay the rest of the creditors and legatees, and that the overplus was 552*l.* 12*s.* 9*d.* which was to be divided according to the will; and that *Charles Noke* and the respondents being infants, *Medly* had secured their shares thereof at interest at 5*l.* per cent. And by this indenture, the trust estate was sold to *Medly* and his heirs, at the price of 3650*l.*

The appellant also set forth an indenture quinquupartite, of the same date with the last deed, reciting, that the trustees had not intermeddled in the trust, and were not to stand to any errors in the computation of the overplus; which, to prevent all mistakes, the appellant and *Charles Samber*, as next friend to *Charles Noke* and the respondent *Selwyn*, had, with great care,

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revised; and reciting, that the trustees and the survivor and his heirs should be indemnified in all events, *Medly* demised to the trustees, their executors, &c. five pieces of marsh land, for the term of 500 years; conditioned for *Medly's* procuring releases from *Charles Noke* and the respondent *Selwyn*; and, in the mean time, for indemnifying the trustees from all suits, &c. on account of the trust and overplus money.

The appellant then insisted, that the trust estate was sold, within the time limited by the will, for 3650*l.* and no more; and that the surplus was no more than 552*l.* 12*s.* 9*d.* And he denied receiving any part of the respondent *Selwyn's* share; but said, that the same remained in *Medly's* hands, secured as aforesaid, together with her 100*l.* legacy.

The other defendants having answered, and the cause being at issue, was heard on the 16th of July, 1723, when the Court declared, that the respondent *Selwyn* was well entitled to the said 100*l.* payable at her age of 21 or marriage; and also to the silver tankard and gold seal, specifically bequeathed, and to a moiety of the rents, profits and produce of the houses in *Watling-street*, from the time of Lady *Selwyn's* death, and to interest for the nett produce thereof, from the respective times the same was received; and likewise to a fourth part or share of the surplus of the trust estate, and to interest for her share of the nett money arising by the sale thereof; and it was therefore decreed, that the appellant should account before the Deputy, for all the personal estate of the testatrix come to his hands, and should be examined upon interrogatories touching the same; and the Deputy was to see whether the trust estate was fairly sold, and for the most money that could be got for the same: And that the appellant and the defendant *Medly* should account before the Deputy, for all the monies arising by sale of the trust estate, and for the interest of the respondent *Selwyn's* share thereof, from the time of the sale, and for her share of the rents and profits thereof, until such sale; all just allowances being made to the appellant and the said defendant *Medly*. And it was further ordered and decreed, that all the personal estate of the testatrix, not specifically devised, should stand charged in the first place with the payment of her debts, funeral expences and legacies, so far as the same would extend, and should be applied towards satisfaction thereof, in case of the trust estate; and if the

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the personal estate should not be sufficient to satisfy the same, then the surplus of the trust estate should be subject and liable to the payment thereof; and that in taking the said account, the Deputy should charge the same accordingly, and state what was due to the respondent *Selwyn* for her share of the surplus of the trust estate, and for the interest thereof as aforesaid, and for the profits thereof until the same was sold.

After this decree, the respondent *Darby* intermarried with the respondent *Selwyn*; whereupon the suit was revived, and the cause being reheard, upon the appellant's petition, on the 10th of June, 1725, the said decree of the 16th of July, 1723, was ratified and confirmed.

From this decree and the order of affirmance, the appellant appealed; contending, that the benefit of the devise of the *residuum* of the testatrix's personal estate, tho' expressly bequeathed to him by the will, was taken away from him by the decree. That the testatrix, by her will, had first created a particular fund for the payment of all her debts, legacies and funeral expences, by devising her real estate to trustees to sell, and with the money thereby arising, in the first place to pay the same; and then gave the overplus remaining in her trustees hands, after all such debts, legacies, funeral and other expences whatsoever should be paid and discharged, to the appellant upon the terms therein mentioned; but if he did not comply with those terms, then he should not have the whole overplus money, but only a fourth part thereof, "remaining after sale of the said estate, and payment of her debts, legacies, funeral and other expences, as aforesaid:" By all which repeated expressions, it was conceived the testatrix had fully declared her intention, that all her debts, &c. should be paid out of the money arising by sale of her real estate. That the testatrix's debts and legacies amounted to abundantly more than the value of the whole personal estate, which remained over and above the specific legacies; and therefore the testatrix knew, at the time of making her will, that if such personal estate was, in the first place, to be applied in payment of her debts and legacies, no surplus would remain to satisfy the bequest of the *residuum* to the appellant; which was a strong evidence of the intention of the testatrix, that the money arising by sale of the trust estate, should, in the first place, be so applied, and her personal estate discharged

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discharged therefrom, unless the trust estate should, by any means, prove deficient for that purpose; and, in that case only, the personal estate should be applied to make good such deficiency. And, that altho' the bequest to the appellant was made by the description of *the rest and residue of her goods, chattels and personal estate*, yet, those words were sufficiently answered and satisfied by the specific legacies *before* given, being first taken out; without making the whole personal estate applicable to the debts and legacies, in exoneration of the trust estate, expressly devised for that purpose; which, in the present case, appeared to be contrary to the testatrix's intention.

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On the other side it was argued, that the personal estate being by law the immediate fund for payment of debts and legacies, the testatrix's making her real estate likewise liable to the payment thereof, did not exempt the personal estate from being first applied for that purpose. That the words, of the devise of the *residuum* of the personal estate, *viz.* "All the rest and
" residue of my goods, chattels, money, plate and personal estate
" whatsoever, not herein before given away nor disposed of,
" my debts, legacies, funeral and other expences being first
" paid and discharged, I give unto my nephew *James Noke*,
" &c." plainly demonstrated, that the testatrix intended her debts and legacies should be paid out of her personal estate, before the residuary legatee should take any benefit by that bequest. Besides, the trustees were not, by the will, obliged to sell the trust estate until two years after the testatrix's death; and it would be very unreasonable and absurd, that the debts, legacies and funeral expences should remain unsatisfied, until sale of the trust estate, and the personal estate, which was subjected to the payment thereof, remain untouched and not applied for that purpose. It was therefore hoped, that the decree and the affirmance thereof, would appear to be just and agreeable to the rules of equity; and that the appeal would be dismissed with costs.

DECREE
affirmed,
Jour. vol. 22.
p. 401.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree and affirmance thereof therein complained of, affirmed.

Robert Barker, - - - Appellant. Case 43.

Nathaniel Gyles and Lawrence Smith,
Executors of Robert Barker, Esq;
Martha Barker, John Blake and Pe-
nelope his Wife, - - - Respondents.

22d April, 1727.

ROBERT Barker, being seised of a real estate and possessed of a considerable personal estate, by his will, dated the 26th of September, 1716, gave and devised to the respondents Gyles and Smith, their heirs and executors, all his manor of Everleigh, in the county of Wilts, then in mortgage, and all his right, equity of redemption, &c. in and to the same, and also his personal estate whatsoever; in trust, to sell and dispose of the said real and personal estate, and by and out of the monies to be raised by such sale, and out of the rents and profits of the real estate, until such sale, to pay off such debts as should be due upon any mortgage of the said premisses, and all other his debts whatsoever, together with the expences of his funeral and the legacies given by his will; and after such payments made, then in trust, to purchase other lands with the surplus of the money arising by the sale, to be conveyed to the said Gyles and Smith and their heirs, upon the trusts following, viz. if such surplus should not exceed 400*l.* then, as to all the lands to be purchased, or so much of them as should be valued in the same purchase at 400*l.* in trust for his sister the respondent Martha Barker for her life; and after her decease, in trust for the appellant, one of the sons of the testator's brother Sir William Barker, and his heirs; and as to the surplus and residue, any should be, of the lands and tenements so to be purchased aforesaid, to the use of, or in trust for Jerome Barker and the appellant, and the survivors and survivor of them, their heirs and assigns for ever, to be equally divided between them, share and share alike: And Gyles and Smith were made executors of his will.

2 Wms. 280.
9 Mod. 157.
Viner, vol. 14.
p 487. ca. 18.
2 Eq. ab. 536.
ca. 4.

The testator did not die till December, 1722; before which time, he greatly increased his personal estate.

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Jerome Barker, dying without issue in the life-time of the testator, the appellant insisted that he was, by survivorship, become entitled to the whole manor of *Everleigh*, and all the surplus of the testator's personal estate, after payment of his debts, funeral charges and legacies: And accordingly, in *Easter* term, 1723, he exhibited his bill in Chancery against *Gyles* and *Smith*, the trustees, and the other respondents, for an account of the whole personal estate of the testator, and of the debts which he owed, and of the surplus of the personal estate, over and above the debts, legacies and funeral expences; and prayed, that if the personal estate should not be sufficient to pay the same, yet, that the manor of *Everleigh* might not be sold, but be conveyed by *Gyles* and *Smith* to the appellant and his heirs; he thereby offering, that the same should be charged with the payment of 20*l.* *per ann.* to the respondent *Martha Barker*, for her life.

The defendants *Gyles* and *Smith*, by their answer said they were advised, that if *Jerome Barker* had survived the testator, he and the appellant would have been tenants in common of the lands directed by the will to be purchased, by virtue of the words, *equally to be divided between them, share and share alike*; but that *Jerome* dying before the testator, the moiety of the surplus intended for him, was, by that means, left undisposed of, and, as such, belonged to the testator's representatives; but, whether the same should be taken as a real estate, being directed to be laid out in land, or whether it should be looked upon as money, and part of the testator's personal estate, they submitted to the judgment of the Court.

The defendants *Blake* and his wife, by their answer insisted, that she was heir at law of the testator; and that if he had made no will, or had devised part of his real estate in such manner that it was become a void devise, they claimed the same in right of *Penelope*, as his heir at law.

The defendant *Martha Barker*, by her answer submitted, that the 400*l.* directed to be laid out for her benefit for life, should be charged upon the manor of *Everleigh*, so as the interest thereof, at the rate of 5*l.* *per cent.* should be paid to her for life.

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On the 4th of *June*, 1725, the cause came on to be heard before the Lord Chancellor *King*; when his Lordship was pleased to decree, that an account should be taken of the testator's personal estate, and of the rents and profits of the real estate, received by the defendants *Gyles* and *Smith*, since the death of the testator; and that an account should be taken of the debts owing by the testator at the time of his decease, and of the legacies devised by his will, and of his funeral charges: And it was further ordered and decreed, that the testator's real estate should be sold to the best purchaser, to be allowed of by the Master, and after payment of the testator's debts, legacies and funeral expences, and the costs of the suit; the surplus of the testator's personal estate, and of the rents and profits of his real estate, and of the money which should be raised by sale of the real estate, should be laid out in the purchase of lands, with the approbation of the Master, in the names of the defendants *Gyles* and *Smith*; and that the lands which should be purchased therewith, should be conveyed to the said defendants *Gyles* and *Smith* and their heirs, upon trust, as to part thereof, which should be of the value of 400*l.* to the use of the defendant *Martha Barker*, during her life; and after her decease, to the use of the appellant and his heirs for ever: And as to the residue of the lands and tenements to be purchased as aforesaid, as to one moiety thereof, to the use of the appellant and his heirs; and as to the other moiety thereof, to the use of the appellant for his life, and after his decease, to the use of the defendant *Penelope* and her heirs.

The appellant conceiving himself aggrieved by this decree, appealed from it; insisting, that by the words of the will, he was entitled to the fee and inheritance of all the lands to be purchased; it being the testator's intent, that the devise should take place for the whole estate, and the inheritance vest in both *Jerome* and the appellant, in case both of them survived him; and if only one survived, that then he should have the inheritance of the whole; and for this purpose the testator had used very proper words, *viz. to the survivor and survivors of them.* That the construction in making a tenancy in common of the inheritance, was not warranted by the words of the will; for tho' the words *equally to be divided* have been taken to make a tenancy in common in a will, where the intention of the testator

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tor appears to be so, yet they are not proper and legal words for that purpose; and therefore have been held not to be sufficient to make a tenancy in common in a deed: But here, the testator had expressly said it should go to the survivor, which took away all presumption of his intending a tenancy in common, much less that he intended a joint tenancy for life, with several inheritances: The consequence of which was, to disappoint the appellant of the inheritance of one moiety, and make the testator die intestate as to the inheritance of that moiety, that so it might descend to the heir at law; which seemed to be quite foreign to the testator's intention. That no sale should have been directed of the manor of *Everleigh*, the personal estate being sufficient for the payment of all the debts and legacies, with an overplus; or at least, not until it appeared that there would be a deficiency of the personal estate for that purpose. That the appellant was further aggrieved by the decree, inasmuch as it was thereby directed, that the surplus of the rents and profits of the real estate, as well as of the money raised by the sale thereof, should be laid out in a purchase; whereas the appellant insisted, that he was in all events entitled to, and ought to receive the whole rents of the real estate, and the whole profits of the surplus of the personal estate, at least during his life, subject to the payment of 20*l.* *per ann.* to *Martha Barker*; and that therefore no part of such rents and profits ought to be invested in the purchase of the lands decreed to be purchased: But that the whole rents until a sale, if any sale should be necessary, as well as the interest of the purchase money, until another purchase was made, and the interest of the testator's other personal estate, after payment of the debts and legacies, ought to be paid to the appellant.

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W. Peere
Williams.

On the other side it was contended, that the decree was just, and agreeable to the rules of law and equity; for that the Court, in making it, proceeded upon this foundation, namely, that by the will, the appellant and *Jerome Barker*, if he had lived, would have been joint tenants for life of the lands to be purchased, with several inheritances to their respective heirs; and that by the death of *Jerome* in the life-time of the testator, the devise of the trust of the inheritance, as to one moiety, became a lapsed devise; and consequently, though the appellant who was the other joint tenant for life, was entitled to enjoy the whole estate for his life by survivorship; yet the reversion and inheritance

inheritance of *Jerome's* moiety being undisposed of by the will, had descended to the respondent *Penelope*, as the testator's heir at law: And this construction of the devise was apprehended to be right, and the only way of understanding it, as hereby all the words of the clause expressive of the testator's intent, could have a proper effect. It was therefore hoped, that the decree would be affirmed with costs.

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ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of, should be affirmed, with this direction; *viz.* That the appellant might be at liberty to apply to the Court of Chancery, for to receive to his own use, the surplus of the rents and profits of the real estate, over and above what should be sufficient, together with the personal estate, to pay off the testator's debts and legacies, and other payments directed by the will; in case it should appear upon the account that there was, or before the sale should be any such surplus; and likewise to apply to the said Court, that no more of the said estate should be sold, than was necessary to make good the payment aforesaid; whereupon such direction should be given, as should be just.

DECREE affirmed.
Jour. vol. 23.
P. 112.

The Right Honourable *Elizabeth*, Baroness Dowager of *Effingham*, Widow and Executrix of *Thomas Lord Howard* Baron of *Effingham*, and also Executrix of *Sir Theophilus Napier*, Bart. -

Case 44.

Appellant.

Sir John Napier, Bart. Son and Heir of *Archibald Napier*, Esq; and Nephew and Heir of the said *Sir Theophilus Napier*, *Sir George Warburton*, Bart. *John Coppin*, Esq; *George Buckley*, and *Thomas Denton*,

Respondents.

1st May, 1727.

AFTER the determination of the former appeal in this cause *, *viz.* on the 14th of July, 1725, *Thomas Lord Effingham* died; having made his will, and thereof appointed the now appellant, his widow, executrix.

2 Wms. 401.
Viner, vol. 4.
p. 418. ca. 11.
12.
* Vide ante.
p. 1. et seq.

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On the 28th of *July*, 1726, the respondent Sir *John Napier*, attained his age of 21, and was served with a subpoena to shew cause against the former decree. But instead of setting down the causes again for hearing, or shewing cause against the decree, he thought fit, when the six months were very near expired, to prefer a petition to the Lord Chancellor *King*, praying liberty to amend his bill, or exhibit a new one, as also to amend his answer to the appellant's cross bill; and that in order thereto, the appellant might produce all the deeds and writings in her custody and power relating to the premises, to the end that he might inspect and take copies of such of them as he should have occasion for.

On the 27th of *January*, 1726, this petition was heard before the Lord Chancellor, assisted by the Master of the Rolls; when his Lordship was pleased to order, that Sir *John Napier* should be at liberty to amend his answer, or put in a new answer to the appellant's cross bill, and that he should have time till the first day of the then next term for that purpose: But as to the amending his original bill, his Lordship declared, that there did not appear to be any precedent in the Court for amending a bill, in any points wherein the same had been dismissed upon the merits; but it was ordered, that Sir *John Napier* should be at liberty to rehear the causes; and to that end, that the original cause should stand over till after the time given for amending his answer, or putting in a new answer to the cross bill was expired: And it was further ordered, that the respondent Sir *John* should be at liberty to see the deeds, writings and exhibits, which were made use of by the appellant at the hearing of the causes; and to that end, the appellant was to leave the same with her clerk in Court, to be inspected by the said respondent, or his agents.

P. Yorke.

T. Reeves.

From this order the present appeal was brought, and on behalf of the appellant it was insisted, that the respondent Sir *John* having first brought his original bill to impeach the settlement of the 16th of *July*, 1718, and the appellant having by her answer to that bill insisted, that the deed was fairly and deliberately executed, and not obtained by any fraud, circumvention, or surprise; the proper and only heads of equity on which the respondent could hope for any relief against the deed, were fully in issue in that cause: And as the appellant's cross bill was to

.establish

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establish the deed, and to have a legal estate in the premises therein comprised, conveyed to her, and as both those causes had been heard together; the respondent Sir *John* ought not now to be at liberty to put in any new answer, or amend his former one; because it might occasion an examination of witnesses *de novo*, to the same matters as were in issue in the original cause, after publication had passed in that cause, and the same had been heard; which was apprehended to be contrary to the known and established rules of the Court of Chancery, and might be a means of introducing perjury. That no precedent could be produced, of leave being given to one who was an infant at the time of putting in his answer to a cross bill, either to amend that answer, or put in a new one, after he came of age, and after both the original and cross causes had been heard: That this case differed from the case of an original bill being brought *against* an infant; and it was apprehended, that the rule in Courts of Equity for infants to have a day to shew cause, against a decree, does not hold in cases where trusts are carried into execution against infants; for in such cases, it hath not been the practice of Courts of Equity to give an infant a day to shew cause. That the declaration of the Court in the order now appealed from, "That there did not appear any precedent in the Court for amending a bill in any points wherein the same had been dismissed upon the merits," might very properly be used as an argument against the respondent Sir *John's* amending his answer, or putting in a new answer to the appellant's cross bill; for if he was at liberty to do so, and thereby bring new matter in issue, or make another defence in the cross cause, and then be permitted to rehear both causes, it might tend to reverse or vary the decree already pronounced in the original cause; and might be productive of the same inconveniencies, as if he had liberty to amend the original bill. That it was apprehended, the order of the House upon the former appeal, could not properly be carried any farther, than that the respondent Sir *John* might, when he came of age, be at liberty, if he thought fit, to apply to the Court of Chancery, to have the causes reheard, upon the pleadings and proofs as they then stood: For, when the House had absolutely reversed that part of the original decree, which related to what the appellant was entitled to by virtue of the settlement of *July*, 1718, and the enquiry directed concerning the value of the lands intended to be comprised in that settlement; it could not be

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be meant that any farther examination should be had as to those matters: And therefore it was hoped, that the order complained of would be reversed; and that as the respondent Sir *John Napier* had not shewn any cause against the decree, the same should now be made absolute.

C. Talbot.

T. Lutwyche.

On the other side it was contended, that the order was warranted as well by the reason of the case, as by the constant and ancient practice of the Court: For that Courts both of law and equity protect an infant from suffering by his inability to manage or defend any suit in relation to his inheritance: At law, in all such suits the parol shall demur, and in many cases where an infant is plaintiff, the proceedings shall be stayed until after he comes of age: And tho' Courts of equity allow of proceedings against an infant as far as a decree, yet at the same time, they always allow an infant time, after his coming of age, to shew cause against such decree; which privilege would be vain and of no use, unless he should be allowed an opportunity of amending that defence, which he is presumed incapable of making properly during his minority. That the present case was still much stronger, because it appeared, that through the neglect of the respondent's former solicitor, his cause had been mismanaged, and several proceedings taken therein to his great prejudice. That the House having taken the former decree to be defective, in not giving the respondent time to shew cause against it after his coming of age, did in great justice supply that omission, and give him time to shew cause according to the course of the Court; and this course allowing the respondent to put in a further answer and amend his defence, it could not be the intention of the House to deprive him of the benefit of any defence which he could justly make against the appellant's claims; without which, these causes would come to a hearing upon an imperfect defence made on behalf of the respondent, when he himself by reason of his infancy was not capable of making any defence, and when his former Solicitor failed to make a proper one for him.

ORDER

affirmed.

Jour. vol. 23.

p. 122.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the order therein complained of, affirmed.*

* Register 1727.

Lib. B. p. 488.

* The parties afterwards compromised all matters in difference, and their agreement for that purpose was, on the 10th of August, 1728, made an order of the Court of Chancery.

Thomas Earl of *Strafford*, Administrator
with the will annexed of Sir *Henry*
Johnson, - - - - - } Appellant.

Case 45.

William Blakeway, - - - - - Respondent.

7th February, 1727.

SIR *Henry Johnson* being possessed of several docks and yards at *Blackwall*, which, amongst other estates, were left to him by his father Sir *Henry Johnson*; he, after his father's death, continued to employ several workmen therein, whom he from time to time paid, and carried on a great dealing in these docks for near 40 years.

2 Wms. 373.
Viner, vol. 11.
p. 320. ca. 25.
2 Eq. ab. 579.
ca. 6.

Sir *Henry* the son not having paid the appellant the greatest part of the portion he had covenanted to give him with his daughter, the appellant's wife; by his will dated the 19th of *March*, 1718, directed that all his debts, legacies and funeral charges should be paid; and in case his personal estate should not be sufficient to pay the same, he devised several parts of his real estate to trustees, in trust for the payment of so much thereof, as his personal estate should fall short to pay; and made *William Guydott* his sole executor, and gave all the residue of his estate to the appellant's two daughters.

The testator died on the 29th of *September*, 1719, and *Guydott* having renounced the executorship, and the appellant's daughters being infants, the appellant thereupon obtained letters of administration from the Prerogative Court, with the will annexed, during the minorities and for the use and benefit of his said daughters.

After such administration was granted, the appellant in looking into Sir *Henry's* accounts and papers, found he had been very remiss in preserving his receipts and vouchers, and in keeping his accounts; and that great sums had been paid by him, for which no receipts could be found.

In *Hilary* term, 1724, the respondent and one *Sarah Harding*, widow, brought their bill in Chancery against the appellant as administrator.

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administrator of Sir *Henry Johnson*, stating, that Sir *Henry* was indebted to the respondent in 343*l.* 11*s.* 3*d.* for sail-maker's work done in and between the month of *February*, 1696, and the month of *July*, 1707, and that 50*l.* was paid on account thereof in 1714; and that Sir *Henry* was indebted to the said *Sarah Harding*, as administratrix of her late husband, in 19*l.* 8*s.* 2*d.* for joiner's work done in 1717; and therefore the bill prayed a discovery of assets, and payment of their said debts.

The appellant had reason to believe nothing was due either to the respondent or the said *Harding*, and that they were encouraged in the suit by some other person; nevertheless the appellant, as to *Harding's* debt it being so small, admitted assets, if she made it appear to be a just debt; but as to the respondent's debt, the appellant having just reason to suspect the reality of it, pleaded the statute of limitations; which plea being argued before the Lord Chancellor *King* on the 19th of *October*, 1726, was ordered by his Lordship to be over-ruled.

T. Lutwyche.

W. Peere
Williams.

The appellant therefore, appealed from this order; and on his behalf it was argued, that it appeared by the respondent's own shewing in his bill, that the pretended work was begun so long ago as 1696, which was about 23 years before Sir *Henry's* death, and that the last of the work pretended to be done, was in 1707, about 12 years before Sir *Henry's* death; and it was not pretended, that he ever sued Sir *Henry*, or even demanded this debt of him, tho' he lived till *September*, 1719, nor was there the least reason assigned for the not doing it; and therefore, if the debt was ever due, it was highly probable that Sir *Henry* himself paid it in his life-time. It must be admitted, that Sir *Henry* might have pleaded the statute of limitations, after the expiration of six years from the year 1707; and the respondent's bill against the appellant, not being filed till the 23d of *January*, 1724, the reasons were apprehended to be stronger, why it should be a good and proper plea for the appellant, who was only an administrator, and consequently an utter stranger to the whole transaction, and to all Sir *Henry's* dealings: And this statute being purposely made for quieting of mens estates, and avoiding of suits for such stale demands; it was humbly insisted, that the plea ought to have been allowed. That Sir *Henry's* will was made about a year and a half before he died, at which time, and long before, the statute had barred any claim of this pretended

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pretended debt: That the will had only enlarged the fund for the payment of debts, but had not altered the nature or condition of those debts, nor was intended to revive any such as were previously barred; for it could not be presumed, that Sir *Henry* intended to deprive his executor of any legal plea, which he himself might have pleaded, or to provide for the payment of any but recoverable debts; for otherwise, he would have let in all persons he had ever dealt with, to come with their demands upon his executor, and put him, who was a perfect stranger, to prove the payment of them. But if the will should be construed to extend to pretended debts, barred by the statute of limitations, such construction being general, and without any limitation of time, would open a gap for all the tradesmen whom Sir *Henry* had ever dealt with, tho' employed and paid off forty years ago, to demand payment over again; and it was impossible, at such a distance of time, for the appellant to prove payment: And if this will was to be so construed, then words of the like import in all other wills must receive the like construction; which, in effect, would totally deprive all executors and administrators, with wills annexed, of the benefit of pleading the statute, tho' such persons, as being strangers to their testator's affairs, stood most in need of it, and would introduce endless frauds and confusion. As to the charge in the bill, that 50*l.* was paid by Sir *Henry* in 1714, on account of the respondent's demand, it was only a bare allegation; and if the same would amount to a waiver by Sir *Henry*, of the benefit of the statute of limitations, the respondent, tho' the plea was allowed, would have the benefit of that circumstance, by replying to the plea: But the appellant must, in common presumption, be considered as an utter stranger thereto, as he was to all the dealings between Sir *Henry* and his tradesmen; and therefore it was prayed, that the order might be reversed, and the plea allowed.

On the other side it was insisted, that the order was just, and agreeable to the rules of equity; because Sir *Henry* in his life-time, viz. on the 7th of *December*, 1714, paid the respondent 50*l.* in part of his debt; whereby the same, if it had been barred by length of time before, would have been set up again; and such payment in part did, in point of law, amount to a new promise by Sir *Henry*, to pay the whole that was due. But since the payment of this 50*l.* Sir *Henry* had, by his will, created a trust for the payment of his debts, out of his real as well

P. Yorke.
C. Talbot.

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ORDER
reversed.
Jour. vol. 23.
P. 179.

well as his personal estate; and this, according to the rules constantly observed in Courts of Equity, extended to satisfy all just debts, notwithstanding that in point of time, the statute of limitations might have run upon them. It was therefore hoped, that the order would be affirmed with costs.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order complained of, should be reversed; and that the plea should stand for an answer, with liberty to except; but not to oblige the appellant to make any discovery of the value or particulars of the real or personal estate, appointed by the will of Sir Henry Johnson for the payment of his debts; and that the benefit of the plea should be saved to the appellant, till the hearing of the cause*.

Case 46. *Aymor Rich,* — — — Appellant.

George Beaumont, Gertrude, Jane, Elizabeth and Sarah Grammar, Infants,
Heyrick Alborpe, John Wadsworth, Respondents,
Clerk, and Samuel Shore, — — —

*J. l. cited 1.
Res. 305.*

9th February, 1727.

Viner, vol. 4.
p. 168. ca. 26.
vol. 22.
p. 277. ca. 47.
2 Eq. ab. 157.
ca. 4. 753.
ca. 2.
3 Atkyns 707.

A TREATY of marriage being concluded between the appellant and *Grace Bagshaw*, the only daughter and heir of *William Bagshaw*, deceased; and the said *Grace* being then seised in fee tail of several manors, lands and hereditaments in the county of *Derby*, part thereof in possession, and other part in reversion, expectant upon the death of *Elizabeth* her mother, who, after the death of Mr. *Bagshaw*, married with *Daniel Clarke*; and having an intention to suffer a common recovery of her said estate, and to settle the same in such manner as she should think fit, notwithstanding her coverture; by indentures of lease and release, dated the 16th and 17th of *October*, 1722, made

* After the most diligent search at the Register-office, the author has not been able to find any further proceedings in the cause; and therefore concludes, that the respondent submitted to the present determination.

between

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between *Daniel Clarke* and *Elizabeth* his wife and *Grace Bagshaw* of the first part, *William Scrimshire* and *John Launder* of the second part, and the respondents *Athorpe*, *Wadsworth* and *Shore* of the third part; the said *Daniel Clarke* and *Elizabeth* his wife and *Grace Bagshaw*, for the barring of all estates tail, remainders and reversions of and in the manor, messuages, lands and hereditaments therein mentioned, did grant and release to *Scrimshire* and *Launder*, and their heirs, the manor of *Great Hucklow*, and all and every the messuages, lands and hereditaments of them the said *Daniel Clarke* and *Elizabeth* his wife and *Grace Bagshaw*, or any of them, in *Great Hucklow*, *Little Hucklow*, *Flag-Money*, *Ash* and *Tidswell*, in the county of *Derby*; to the intent, that *Scrimshire* and *Launder* might be tenants of the freehold of the said premises, for the suffering a common recovery thereof: And which was accordingly suffered in *Michaelmas* term following. And it was by the said indenture of release covenanted, that the intended recovery should be and enure to and for the uses and purposes, and upon the trusts therein after declared, viz. to the use and intent, that *Elizabeth Clarke* might have, during her life, an annuity or rent-charge of 200*l.* to be issuing and payable out of the premises by quarterly payments, free from taxes, and with power of distress for non-payment thereof: And, subject to such rent-charge, to the use of the respondents *Athorpe*, *Wadsworth* and *Shore*, their heirs and assigns, upon trust, to permit and suffer *Grace Bagshaw* and her assigns, during the term of 99 years, to be accounted from the date of the said indenture, if she should so long live, to receive and take the rents and profits of the said premises, to and for her sole and separate use and benefit; whether she should be sole or married, and exclusive of any husband or husbands she might at any time thereafter marry: And upon further trust, that if *Grace Bagshaw* should leave issue, either a son or sons, daughter or daughters, or both, that should survive her, or that the issue of such son or sons, daughter or daughters, should survive her; then the trustees and the survivor of them, his heirs and assigns, should, upon request and at the direction of the said *Grace Bagshaw*, testified under her hand and seal, by any deed in writing, or by her last will and testament in writing, or any instrument purporting to be her last will, signed in the presence of three or more credible witnesses, grant and convey the premises, subject to the said yearly rent-charge, to and amongst such child or children as she should leave,

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Note the usual words "notwithstanding coverture omitted in this power. & also in the subsequent powers. But no objection to the execution seems to have been taken on that account. See Co. Litt. 112. a. & my note there to. b. & my wife's references.

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leave, or to the issue of such child or children, if they should die before the mother, to and for such estates and uses, and in such manner and proportion, as by such writing, will or instrument, should be directed and appointed; and for want of such direction and appointment, should grant and convey the said premisses to and amongst such child or children of the said *Grace Bagshaw*, as she should leave at her decease; or, in case of the death of such child or children before her, then to the issue of such child or children, equally to be divided amongst them, to take as tenants in common, and not as joint tenants: And upon further trust, that in case *Grace Bagshaw* should leave no issue of her body, and that the said *Elizabeth Clarke* her mother should survive her, then the trustees and the survivor of them, his heirs and assigns, should, upon request and at the charge of the said *Elizabeth Clarke*, grant and convey the said premisses to her and her heirs: And upon further trust, that in case *Elizabeth Clarke* should not survive the said *Grace Bagshaw*, then the trustees and the survivor of them, his heirs and assigns, should, upon request and at the charge of the said *Grace Bagshaw*, grant and convey the premisses to her and her heirs, or to such other use or uses, person or persons, and for such estate and estates as she should, by any instrument in writing under her hand and seal, attested by two or more credible witnesses, or by her last will and testament in writing duly executed, or other instrument purporting to be her last will and testament, direct and appoint; and for want of such appointment, then to convey the same to such person and persons, and their heirs, as for the time being should be heirs at law of the said *Grace Bagshaw*.

And in this indenture of release was contained a proviso, that in case the said *Grace Bagshaw* should survive the said *Elizabeth Clarke*, it should and might be lawful to and for her, by deed indented under her hand and seal, executed in the presence of three or more credible witnesses, or by her last will and testament in writing duly executed, to revoke, alter, change, determine and make void all or any the use or uses, estate or estates therein before limited, declared or appointed, of and concerning the said premisses; and by the same, or any other deed or will, to create or raise, limit or appoint any other new use or uses, estate or estates, of and concerning the same, or any part thereof.

Cases in Parliament.

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Grace Bagshaw, at the time of executing these deeds, declared she was going to be married to the appellant; and that she intended the estate for the advancement of the appellant and his family; and the deeds were accordingly executed with a view and intention of vesting a power in her for that end and purpose.

The marriage was soon afterwards had; and *Elizabeth Clarke* died in *January, 1722*, in the life-time of her daughter *Grace*.

The appellant and his wife had issue only one son, named *Elkanah*; and she having a settled intention to advance the appellant and his family, as she frequently declared, by virtue and in pursuance of the powers reserved to and vested in her by the said settlement, but without having any opportunity of seeing the same; did, on the 29th of *September, 1724*, make, sign and seal her last will and testament, attested by three credible witnesses; and thereby gave and devised to her said son all her real estate in lands, tenements and hereditaments, whether freehold or copyhold, in the county of *Derby*; and willed, that her said son should enter into full possession of one half of her said real estate, as soon as he should accomplish his age of 21, or day of marriage, which should first happen; and into full possession of the residue thereof, at the death of the appellant his father: And she gave to the appellant all the rents and profits of her said real estate, until such time as her said son should accomplish his age of 21, or day of marriage; the appellant taking care to maintain, educate and bring up her said son, according to his degree and quality, until such his age or marriage as aforesaid; and from and after the time that her son should attain such his age or marriage, she thereby gave to the appellant only one half of the rents and profits of her said real estate, for and during the term of his natural life: And if her son should happen to die in his minority, not having any lawful issue at the time of his decease, then she devised all her said real estate to the appellant, his heirs and assigns for ever. And she ordered and directed, that her trustees, or such of them as should be living, named in a settlement lately made of her estate in *Derbyshire*, should convey their said trust estate to such uses, and for such persons as were named in her said will: And she thereby gave all her goods, chattels and personal estate

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whatsoever, and also her lead mines and mineral duties, to the appellant, and made him sole executor.

On the very same day the testatrix died; and in February following, her son also died, an infant, and without issue.

The appellant apprehending, that by virtue of the said will, or writing purporting to be the last will of his said wife, he was upon the death of his son well entitled in equity, to the fee simple and inheritance of the premises, and to have a conveyance of the legal estate thereof made to him and his heirs by the trustees; in *Hilary* term, 1724, exhibited his bill in Chancery against the respondents *George Beaumont, Gertrude, Jane, Elizabeth* and *Sarah Grammar*, as the heirs at law of his late wife, and against the trustees; praying, that the trustees might convey the legal estate in the premises to the appellant and his heirs.

The defendants having put in their answers, and witnesses being examined on both sides; the cause came to a hearing before the Lord Chancellor *King*, on the 11th of *February*, 1726; when his Lordship was pleased to dismiss the appellant's bill as against the trustees with costs, and as to the other defendants the heirs at law, without costs; his Lordship declaring, that if the appellant had any title to the premises in question, his remedy was proper at law and not in equity.

P. Yorke.

T. Latwyche.

The appellant therefore appealed from the decree, and on his behalf it was argued, that in case his late wife happened to survive *Elizabeth Clarke* her mother, then the trustees of the settlement, pursuant to the trusts therein declared by a separate and distinct clause, were upon her request and at her option, either to convey the premises to herself and her heirs, in her life-time, or to such other person or persons, and for such estate and estates, as she should by any instrument in writing, under her hand and seal, attested by two or more witnesses, or by her last will in writing duly executed, or other instrument purporting to be her last will and testament, direct and appoint. That by the intent of the general proviso in the close of the settlement, an absolute power was also reserved to the appellant's wife, on the death of her mother, to revoke and alter the former trusts and to substitute new ones in their place, by her last will and testament duly executed, and to declare for whose benefit such new trusts should

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should enure. That she having survived her mother, which was the only contingency expressed in either of the said clauses, and having by her will, or an instrument purporting to be her will, duly executed subsequent to her mother's death, limited and appointed the premises and the equitable estate therein to the appellant and his heirs, upon the contingency therein mentioned, and which had since happened; the appellant ought to enjoy the benefit of such appointment, and was entitled to have a conveyance of the legal estate from the trustees accordingly. That the appellant's wife by her said will or instrument, directed her trustees to convey their trust estate to such uses, and for such persons as were named therein; whereby she expressly declared her intention to be, that the legal estate should remain in the trustees, and directed it to be conveyed by them to such *cestui que* trusts as she had nominated by her will; and the only proper remedy to obtain such conveyance, was in a Court of Equity. But if this will, or instrument should be construed to enure as a revocation of the legal estate out of the trustees, rather than as a declaration of the trusts of that estate; the same by such construction would be made to enure contrary to the express words thereof, and contrary to the manifest intention of the party therein declared. That the settlement plainly appeared to have been executed by the appellant's late wife, with a view and intention of putting the disposition of her estate in her own power, so that she might thereby have an opportunity of advancing the appellant and his family: That her constant declarations to this purpose, and the solemn execution of her will with this view, fully explained and confirmed it to have been her intention. And that this being the case of a will, a trust and a power arising upon a trust, all which have usually received in Courts of Equity a liberal sense and construction, the same ought here to be taken liberally, in favour of their intended operation; and no construction ought to be admitted, which would manifestly overturn and disappoint the declared intention of the party.

On behalf of the respondents it was contended, that there were two distinct cases provided for by the settlement; the first, if Grace Bagshaw should die leaving any child or children, or issue of any child or children, who should die in her life-time: in which event, her power of appointing was confined wholly to such child or children as she should leave, or to the issue of

C. Talbot.

N. Fazakerley.

Cases in Parliament.

such as should die before her; and the limitation in default of an appointment, was, in like manner, confined to her child or children, or to their issue. The next case provided for, was that of *Grace Bagshaw's* dying without issue surviving her; which was subdivided upon the different contingencies of her mother's surviving her, or of her surviving her mother; and to this the power of revocation was immediately subjoined: Now *Grace* having left a son who survived her, it was apprehended that neither branch of this division, or the power of revocation, ever did, or was intended to take place. But if the power existed, it was not well executed; for when a power is reserved to revoke by a last will duly executed, it must mean a legal will; one that is to be made under those circumstances, and with such qualifications as the law requires; but a feme covert's will of lands is by law absolutely void. That there was no necessity of understanding the will mentioned in the power, in any sense different from the legal one, so as to mean any declaration of her last will and intent, tho' during coverture; because she was unmarried at the time of creating the power, and might then have executed it according to law; her marriage was a suspension only of the power during coverture, and upon surviving her husband, if that contingency had happened, she might again have executed it. If the will was a good revocation, the uses limited to the trustees were revoked; and consequently their legal estate was taken away and vested in the appellant, and then there was no foundation for his applying to a Court of Equity to have a conveyance from the trustees. But whether the revocation in point of law was good or not, was a question merely at law, where the appellant might have the full benefit of his right, if he had any; and if there was any legal defect in the execution of the power, a Court of Equity would never make it good in favour of a volunteer, against a disinherited heir: And therefore it was hoped, that the order of dismissal would be affirmed, and the appeal dismissed with costs.

DECREE
reversed.
Jour. vol. 23.
p. 180.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree of dismissal therein complained of, should be reversed: And it was further ORDERED, that the Court of Chancery should direct a case to be stated between the parties, and to be sent to the Judges of the Court of King's Bench, for their opinion on the following points;

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viz. "Whether the will, or instrument purporting to be the will of *Grace Rich*, formerly *Grace Bagshaw*, the appellant's late wife, dated the 29th of September, 1724, be a good appointment of the estates therein contained: And whether the trusts therein limited be uses executed, or trusts:" And that on the return of the opinion of the Judges of the said Court of King's Bench to the Court of Chancery, that Court should proceed to make such further order thereupon as should be just.*

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Jasper Jones and *Frances* his Wife, - Appellants.

Case 47.

John Kenrick, - Respondent.

13th February, 1727.

FRANCIS Leigh, the appellant *Frances's* father, being seised in fee and in possession of an estate in *Shropshire*, of about the yearly value of 60*l.* and being also seised of the reversion in fee, expectant on the death of *Lydia Leigh* his mother, of the manors of *Puttenham-Bury* and *Puttenham-Priory*, and divers lands in *Surry*, of the yearly value of 120*l.*; in July, 1683, mortgaged all the premises to *Elizabeth Worster*, widow, for two several terms of 1000 years each; and that mortgage having been assigned to *Sir Robert Dashwood* in 1689, for securing 2300*l.* and interest; he, by indenture dated the 23d of May, 1691, in consideration of 550*l.* paid to him, being all the money then remaining due on that mortgage, and of 350*l.* paid to *Francis Leigh*, making together 900*l.* did, by *Francis Leigh's* direction, assign over the two mortgage terms

Viner, vol. 15.
p. 470. ca. 18.
2 Eq. ab 602.
ca. 31.

* It seems rather singular, that the House should, upon this occasion, direct a case for the opinion of the Court of King's Bench; instead of ordering the Judges to attend, and calling for their opinion in the usual way: And in 3 *Atkyns*, p. 707. Lord Chancellor *Hardwicke* said, "that this was the only instance of a case made by the direction of the House of Lords, for the opinion of the Judges." But it is still more extraordinary, that after such a case was directed, no steps should have been taken on either side to have it argued: For, after a very laborious search, the author has not been able to discover a single trace of any further proceedings in the cause; except an order of the Court of Chancery, directing the case to be settled by the Master, in case the parties differed in stating it.

of

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of 1000 years each, to Sir *William Cranmer*; redeemable by *Francis Leigh* and his heirs, upon payment of 900*l.* and interest at 5*l.* per cent.

Francis Leigh being also entitled to 1000*l.* *East India* stock, and having afterwards occasion for more money, Sir *William Cranmer* advanced the same; and for securing the repayment thereof, *Francis Leigh* on the 24th of May, 1691, transferred the stock to him; and by a memorandum in writing it was agreed, that Sir *William* should receive the dividends, and have power to sell and transfer the stock, with *Leigh's* approbation, and pay himself the money lent on the security of it, and also the 900*l.* mortgage money and interest; and the surplus was to be paid to *Leigh*.

The *East India* company having made calls upon the proprietors of their stock, Sir *William Cranmer*, on *Leigh's* behalf, paid several sums pursuant to such calls, whereby there was a considerable addition made to the 1000*l.* stock: And by a writing between them it was agreed, that the 1000*l.* capital, together with the additional stock, should be a security to Sir *William* for such money as he had paid to the company, and that the mortgaged estates should likewise stand charged with the same. And by indenture dated the 1st of December, 1694, between Sir *William* and *Leigh*, it was declared, that *Leigh* had paid Sir *William* 255*l.* and that they had then come to an account for the several sums lent by Sir *William*, and for all interest due thereon, and for all receipts and payments concerning the same; and that there then remained due to Sir *William* 1500*l.* principal money only, which was agreed to be continued on the several securities charged therewith, at an advanced interest of 6*l.* per cent.

Sir *William Cranmer* died in September, 1697, having made his will and appointed the respondent sole executor, who thereby became entitled to the money due from *Leigh* on the above securities; and after the testator's death, took upon him to sell the 1000*l.* capital, and all the additional stock, and thereby and by the dividends received by him and his testator, together with several considerable sums paid by *Leigh* to the respondent and his testator, the money due on the said securities was very near satisfied: Notwithstanding which, in the year

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1705, the respondent taking advantage of the misfortunes of *Leigh*, who then was and to the time of his death continued a prisoner, entered on the *Shropshire* estate, and from that time received the profits of it.

Sometime in *July*, 1710, *Francis Leigh* died a prisoner for debt in *Newgate*; leaving the appellant *Frances* his only child and heir, then an infant of the age of 12 years: But *Leigh* by his will, dated the 25th of *July*, 1710, devised all his real and personal estate whatsoever in *England*, or elsewhere, to the appellant *Frances*, by the name of his loving daughter *Frances Leigh*, and made her sole executrix; who by virtue of such will, and as heir to her father, became entitled to the equity of redemption of the mortgaged premises.

On the 4th of *September*, 1711, *Lydia Leigh*, the appellant *Frances's* grandmother, died; upon whose death the respondent entered on the estate in *Surry*, and received the profits thereof; so that in case any thing remained due to him on the mortgage and other securities, over and above the money which he received by sale of the capital and additional *East India* stock, and the dividends and profits thereof, and the money paid by *Leigh* in his life-time, the mortgage debt had been fully paid by perception of the rents and profits of the estates.

Upon the death of *Francis Leigh*, the appellant *Frances* his daughter by reason of her father's misfortunes and troubles, was left destitute of any provision, or means of subsistence; and till her marriage, was maintained by the charity and assistance of her relations; who during her infancy applied several times to the respondent to account with her touching the premises, and to make her an allowance towards her maintenance: To which the respondent answered, that if the appellant's relations would insure her life, he would make her an allowance, for that there was more than enough to satisfy him; but in case the appellant *Frances* died before she came of age, he might be a loser by making such allowance; because the estate would then go to the next heir, and therefore he could do nothing till she came of age, and then *he would act like an honest man*.

The appellant *Frances* attained her age of 21 on the 14th of *May*, 1719; and her father having left his affairs in the utmost disorder and confusion, she was not in any condition to commence

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a suit against the respondent, but by herself and friends often applied to him to account with her for the rents and profits of the mortgaged premises, and the money raised by sale of the *East India* stock; and several meetings were thereupon had, when he made some inconsiderable offers for the appellant *Frances's* right to the estate in question, but refused to come to any account with her.

The appellants intermarried on the 10th of *October*, 1723; whereupon the appellant *Jasper*, being in right of his wife, entitled to the equity of redemption of the mortgaged premises, applied again to the respondent to come to a fair account; and he still refusing so to do, the appellants in *Michaelmas* term, 1723, exhibited their bill in Chancery against the respondent, for an account of the rents and profits of the estates in *Shropshire* and *Surry*, and of the money raised by sale of the *East India* stock, and that they might be let into a redemption of the mortgaged premises.

To this bill the respondent put in a plea and answer; and as to so much of it as sought to compel an account of the rents and profits of the mortgaged estates and the *East India* stock, and to let the appellants into a redemption thereof; the respondent pleaded, that he, as executor of Sir *William Cranmer*, did, in *Hilary* term, 1698, exhibit his bill in Chancery against *Francis Leigh*, praying, that he might either pay the respondent, by a time to be prefixed by the Court, the 1500 *l.* and interest, together with his costs, or be foreclosed of his equity of redemption of the premises: That *Leigh* put in his answer to this bill, and that the cause was heard on the 16th of *February*, 1701, in the presence of the respondent's council, none appearing for *Leigh*; when it was referred to one of the Masters of the Court, to compute what was due to the respondent for principal, interest and costs, on his mortgage; and that upon *Leigh's* payment thereof, at such time and place as the Master should appoint, the respondent was to reconvey to him the mortgaged premises; but in default of such payment, *Leigh* was to be foreclosed of his equity of redemption of the mortgaged premises, and release the same to the respondent; unless he being served with a *subpœna* should shew cause to the contrary: That this order on hearing was, by another order of the 8th of *June*, 1702, made absolute: That the Master made his report on the 12th of *February*,

February, 1702, and thereby certified that there was due to the respondent for principal, interest and costs, on his mortgages and securities, over and above what he had received by sale of the *East India* stock and the dividends thereof, and other monies in the report mentioned, the sum of 932 l. 13 s. 2 d. which the Master appointed *Leigh* to pay the respondent on the 18th of March, 1702: That this report was confirmed by an order of the 18th of February, 1702, unless cause; and by another order of the 19th of March following, upon the respondent's own petition, it was ordered, that the time for payment of the money certified to be due, should be enlarged till the first day of the then next term; and by a final order and decree of the 23d of July, 1703, inrolled, reciting the bill, answer, and the several other proceedings; that *Leigh* had due notice of the order for confirming the report, and that no cause had been shewn to the contrary; it was therefore ordered and decreed, that the report should be confirmed, and that *Leigh* should be absolutely foreclosed of his equity of redemption of the mortgaged premises, and should release the same to the respondent.

Upon arguing this plea before the Lord Chancellor *Macclesfield*, on the 18th of May, 1724, his Lordship held it to be insufficient, and over-ruled the same: After which the respondent put in two answers to the bill, and thereby admitted, that he got possession of the mortgaged estate in *Shropshire*, and received the rents thereof from *Michaelmas* 1705; and that he entered on the estate in *Surry* in the year 1711.

The cause being at issue and witnesses examined on both sides, was heard before the Lord Chancellor *King* on the 4th of June, 1725; when his Lordship was pleased to dismiss the bill, but without costs.

The appellants being advised, that the decree of foreclosure set forth in the respondent's plea, was erroneous; they did, in *Easter* term, 1726, exhibit their bill of review against the respondent, setting forth the several proceedings in the cause brought by him against *Francis Leigh*, and the decree of foreclosure; that the original decree, and the report grounded thereon, and also the decree of foreclosure were pronounced, made, signed and inrolled, while *Leigh* was a prisoner; and that he continued a prisoner to the time of his death: That the rents and profits of the mortgaged estates received by the respondent, since

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since the respective times of his entering thereon, were more than sufficient to pay his principal, interest and costs; and that the value of the mortgaged premises to be sold, would amount to more than four times the money reported due to the respondent on his mortgage. And then the appellants assigned the following errors, as appearing in the body of the decree of foreclosure, viz. I. That the Master's report of the 12th of *February*, 1702, certified, that there was due to the respondent on his mortgage, 932*l.* 13*s.* 2*d.* which he appointed *Francis Leigh* to pay the respondent on the 18th of *March*, 1702; which report was, by the order of the 18th of *February*, 1702, confirmed, unless cause within eight days after notice; and by the other order of the 19th of *March* following, the time for paying the money was enlarged to the first day of the then next term, which began on the 14th of *April*, 1703, and the order of the 18th of *February*, 1702, was made absolute on the 23d of *July*, 1703, according to the decree of foreclosure signed and inrolled: So that the report not being absolutely confirmed till the 23d of *July*, 1703, which was above three months after the time appointed for payment of the money reported due to the respondent, and the report being as no report till confirmed; *Francis Leigh* had no time or opportunity of paying the money, the day appointed for payment thereof being past, before the report was absolutely confirmed; and therefore such decree of foreclosure ought not to have been pronounced for nonpayment of that money, which he had no day or opportunity given him to pay. II. That the order of the 23d of *July*, 1703, which confirmed the report according to the decree signed and inrolled, did also absolutely foreclose the said *Francis Leigh*; whereas by the rules of the Court, he ought to have had some time at least, for payment of the money after the report was absolutely confirmed, and before the decree of foreclosure had been pronounced. III. That it did not appear by the decree of foreclosure, or any of the proceedings in that cause, that any affidavit was made, that the respondent, or any on his behalf, attended at the time and place appointed by the report and order of the 19th of *March*, 1702, to receive the money; or that *Leigh*, or any other person for him, was not then and there present, and ready to pay or tender the same; for want of which affidavit, the decree was no way warranted, but was irregular and erroneous. IV. That there was, in fact, no such order as

in the decree of foreclosure was mentioned to be made on the 23d of June, 1703.—Therefore, and for other errors appearing on the face of the decree of foreclosure and proceedings, the appellants, by their bill of review prayed, that the said decree might be reviewed and reversed; and that they might be let in to redeem the mortgaged premises.

To this bill the respondent put in a demurrer; and, upon arguing the same on the 25th of November, 1726, before the Lord Chancellor, his Lordship was pleased to allow the same.

The appellants therefore appealed, not only from this order allowing the demurrer, but also from the order of dismissal of the 4th of June, 1725; insisting, that the estates in mortgage were of much greater value than the money due to the respondent, the same being worth to be sold, at least 5000*l.*; whereas the money reported due for principal, interest and costs, was only 932*l.* 13*s.* 2*d.* And tho' the *Surry* estate was then a reversion only, yet the tenant for life being 76 years of age, that estate was then worth to be sold, between 2 and 3000*l.*; and the *Shropshire* estate, which was in possession, was, by the respondent's own admission, between 50*l.* and 60*l.* *per ann.* That the decree and Master's report, and the subsequent proceedings thereon, were all *ex parte*, and undefended by the appellant's father, who was then a prisoner, and so continued to the time of his death. It was further observable, that the Master, instead of giving the appellant's father six months time to pay the money, as in such cases is usual, gave him only thirty four days; nor was that time enlarged, save by the respondent himself, because he could not get the report confirmed within the time, and then only twenty six days more were given; so that it was almost impossible to comply with the short time appointed to pay the money, even if the proceedings had been regular. That it appeared by the decree of foreclosure itself, that the appellant's father did not suffer these proceedings to go against him *ex parte* out of any obstinacy; for before his misfortunes came upon him, and even pending that very suit, he paid to the respondent 1300*l.* in part of the mortgage money; and before the suit was commenced, he paid as much more, as with that 1300*l.* amounted to 1654*l.* 6*s.* 11*d.* Notwithstanding all which payments, and the great over-value

C. Talbot.

T. Lutwyche.

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of the security, the respondent, in a most oppressive manner, proceeded to a foreclosure. That the errors assigned by the bill of review, were conceived to be unanswerable; it appearing in the body of the decree, that the time for payment of the money was elapsed above three months before the report was confirmed; so that the appellant's father had, in fact, no time at all to pay the money: It likewise appeared, that the same order which confirmed the report, did also foreclose; and it did not appear by the decree, that the respondent attended at the time and place appointed by the report to receive the money, or that the appellant's father was not then and there present; and these gross errors appearing upon the face of the decree, were the reason that the respondent's plea to the original bill was overruled. But should it be objected, that this decree of foreclosure being signed and inrolled above twenty years ago, it might be attended with dangerous consequences to break into it, tho' not strictly regular in all its parts; and that it would be hard to travel the respondent into a long account, after an acquiescence of above twenty years: It was answered, that the length of time was accounted for by the appellant's father being a prisoner at the time this decree was inrolled, and so continuing till his death; and by the infancy of the appellant *Frances*, who was but 12 years of age when her father died, and did not attain 21 till the year 1719. And all the acquiescence which could in reality be pretended, was but four years, the original bill being brought in the year 1723; and even during those four years, there were frequent applications made to the respondent, as well as during the appellant *Frances's* infancy: Besides, it was in proof, that the respondent himself declared, "he could do nothing till the appellant *Frances* came of age, and that then he would act like an honest man." That these estates were the chief, if not the only dependance which the appellants had for the support of themselves and their family; and as the respondent could not possibly be injured by receiving his whole principal money, with interest at 6l. per cent. it was hoped, that both the said orders would be reversed and set aside; and that the appellants might be let into a redemption of the mortgaged premisses.

P. Yorke.

J. Hunter.

On the other side it was argued, that as to the order of the 4th of June, 1725, no objection could be made to it, the decree of foreclosure standing in full force, and not to be impeached

peached or reversed by an original bill: And tho' the Court did not think fit to allow it as a plea, yet the over-ruling that plea could not take away the force of the decree, or prevent the respondent from making use of it by way of defence, at the hearing of that cause. And as to the other order for allowing the demurrer, the particulars assigned by the appellants for errors in the decree of foreclosure were not matters of substance, but merely of form; which, after such a distance of time, were not to be regarded, nor did they affect the merits or justice of the case. For tho' the report might not be absolutely confirmed, till the time appointed for payment of the money was elapsed; it did not follow from thence, that *Leigh* had no day or opportunity given him for payment of the money. It was plain, that the report, which ascertained the money due to the respondent, and appointed the time and place for the payment of it, was made on the 12th of *February*, 1702; the time appointed for payment, was on the first day of *Easter* term following, which was alledged by the appellants to have been on the 14th of *April*: Now *Leigh* had due notice given him of this report, and of the order for confirming it unless cause, on the 10th of *March*, 1702, against which he never shewed any cause, and the decree was not made absolute till the 23d of *July* following; so that he had sufficient time allowed him to pay the money, and it could not with any reason be said, that he had no day or opportunity given him for such payment. That it was not required, either by the rules of the Court, or of justice, that *Leigh* should have had any farther time allowed him as of course, and without application, for payment of the money, after the report was absolutely confirmed; the day appointed by the report always is, and must in these cases be the rule for payment of the money, it being by the decree expressly directed to be paid on such day, unless either party thinks fit to apply to the Court to enlarge the time; and which is often done where the defendant thinks it worth his while to redeem, and has any prospect of raising the money: But, from *Leigh's* not doing so, it was evident that he neither had the money ready, nor thought it worth his while to redeem, or that he was any way aggrieved by the proceedings. That as the decree was not made absolute till the 23d of *July*, 1703, it was more reasonable to have expected from *Leigh*, to have shewn to the Court that he attended at the time and place appointed, and was then

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and there ready to pay the money, but that the respondent was not there to receive it; than from the respondent to have shewn that he attended to receive it, but that *Leigh* was not there to pay it. He had time enough to do this between the 14th of *April* and the 23d of *July*; and therefore it must be presumed, that the respondent was ready to receive it, but that *Leigh* was not ready to pay it. That as to the formality of the proceedings in the decree of foreclosure, it was apprehended, that if there had been any thing omitted or done to the real prejudice of *Leigh*, or that he had not sufficient notice of what was doing, or was straitened in time with respect to raising the money, he would and ought to have complained of it, between the 14th of *April*, 1702, and the 23d of *July* following, or between that time and *July*, 1710, when he died; but he was so far from thinking himself aggrieved by any of the proceedings, or that it was then worth his while to redeem the mortgaged premises, that he never complained by bill or otherwise against the decree, or even prayed to have the mortgaged estate sold. And tho' he had a cross bill depending against the respondent at the same time, and relating to the same matter, and in *Michaelmas* term, 1704, filed a supplemental bill; yet he permitted the same to be dismissed with costs for want of prosecution, on the 29th of *November*, 1707; having thereby gained what he principally aimed at, viz. the keeping the respondent out of possession of the *Shropshire* estate till *Michaelmas*, 1706. After all these proceedings, the respondent apprehended that he had a regular and good decree of foreclosure, and accordingly entered upon, enjoyed and managed the estates as his own property; it would therefore be a very great hardship, if not injustice, to strip the respondent of his estate, and compel him to account, on pretence of slips in form only, and not in substance. As to the insinuation, that the estates were of much greater value than the money reported due to the respondent, it was to be considered, that tho' the foreclosure was in *July*, 1703, yet he did not get possession of one of these estates till *Michaelmas*, 1706; and that the other estate was a reversion on a life, which did not fall in till *Michaelmas*, 1711; and being a contingency which might happen sooner or later, it was unjust for the appellants to expect any advantage from it; for in case the life had subsisted longer, and the respondent had been kept out of the possession till this time, the appellants were under no obligation to make good to him

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him any deficiency which might have thereby happened. Besides, the respondent never was in the possession of a considerable part of the mortgaged premises, particularly of several lands in *Bryn* in the county of *Salop*, which, before the decree of foreclosure had been entered upon, and were still held for the non-payment of a rent-charge of 20*l.* *per ann.* being their full value; nor of a fee-farm rent of 7*l.* 13*s.* 4*d.* other part of the premises, for the recovery whereof the respondent had expended a considerable sum of money, but without effect. That the price of lands was very much risen within these twenty years; and if an increase in the value of the security should be thought a reason for opening a foreclosure, or add any weight to slight objections in point of form for that purpose, no foreclosure could continue for many years, and the greatest confusion would be introduced in estates depending on those titles. That the respondent acted in this case in the capacity of an executor; and upon the foreclosure, this estate became assets in his hands, liable to the payment of debts and legacies; and he had accordingly, before the appellants first bill was filed, sold part of the *Shropshire* estate; so that the purchaser thereof, who was no party to this suit, might be greatly affected by it. As to the objection taken on account of *Leigh's* imprisonment at the time of the decree of foreclosure, and till his death; and that all the proceedings were *ex parte*, and undefended: It was answered, that tho' *Leigh* was a prisoner, yet he was a prisoner at large; and it was in proof in the appellants first cause, that he was frequently abroad in the streets of *London* and in the country, following his business as an attorney or solicitor, and particularly in a cause of great litigation in the year 1708; it was also evident, that he was sufficiently at leisure to defend the respondent's suit, if he had thought fit, by his keeping the respondent out of possession of the *Shropshire* estate, from *July*, 1703, to *Michaelmas*, 1706; but not intending to redeem, it was for his advantage not to make any defence, as he thereby gained time. Upon the whole it was submitted, whether, after a foreclosure of above twenty years, of an estate part in possession and part in reversion on a life, and thereby subject to the contingency of such life's falling sooner or later, and when the price of land was considerably risen, it was just or equitable to permit the appellants, after the death of such tenant for life, and especially after the respondent had been so many years in

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quiet possession, to redeem the estate; altho' at last by the death of the tenant for life, by the receipt of the rents, and by the accidental increase in value, the estate might exceed the principal and interest due on the mortgage; and if not, whether any omission of the respondent's Solicitor or Clerk in Court, in matters of mere form, should be thought sufficient to involve the respondent in an intricate account of the rents and profits of these estates for such a number of years, after he had reasonably esteemed them as his own.

JUDGMENT
by agreement.
JOUR. VOL. 23.
P. 184.

ON the day appointed for hearing this appeal, the counsel on both sides informed the House, that the parties had come to an agreement, which having been reduced into writing and signed, they were desirous should be made the order and judgment of the House: And accordingly the agreement being delivered in and read, it was ORDERED and ADJUDGED, that the appellants should pay to the respondent 1150*l.* in full of all his claims and demands for principal, interest and costs upon the estates in question; and that thereupon the respondent should reconvey and reassign, as the appellants should direct, the several mortgages and securities, and all his right and title to the several estates, free from all incumbrances done by him, or any claiming under him, except leases at improved rents; and should also deliver possession of the estates to the appellants, except such part thereof as had been sold by him to Mr. *Baldwin*, which sale the appellants were to confirm at the purchaser's request and expence: And that the money raised by sale of such part of the estate as had been sold, should be accounted and taken as part of the 1150*l.*; and that the respondent should receive all the rent and arrears of rent to this time, and the growing rents from this time to be received by the appellants: And if the residue of the 1150*l.* should not be paid to the respondent in a month from this day, then the appellants should pay interest from that time for such residue; and upon payment of the money and executing conveyances, mutual releases should be given: And it was further ORDERED, that this judgment should be transmitted to the Court of Chancery, in order for that Court to cause the same, as occasion might require, to be effectually complied with.

Mary

Mary West and Frances West, Infants, Appellants. Case 48.

Mary Erissey, and Thomas Barable, an Infant, Respondents.

15th February, 1727.

BY articles of agreement dated the 23d of December, 1685, between Sir Peter Killebrew of the one part, and James Erissey, Esq. and Richard Erissey his nephew of the other part, in consideration of a marriage then intended between Richard Erissey and Frances Killebrew, daughter of Sir Peter; it was agreed, that Sir Peter should pay for the portion of his daughter 1700*l.* viz. 200*l.* part thereof to James Erissey, and the other 1500*l.* to be disposed of in a purchase of lands, or lease of 90*l.* per ann. for the use of Richard Erissey for his life; remainder to Frances during her life, in part of her jointure; and after her death to the heirs, executors, or administrators of Richard. — And James Erissey agreed to settle in hand, an estate of 40*l.* per ann. in conventional rents, upon Richard and his heirs, with liberty to set and let for three lives; which estate was to be to the use of Frances for her life, with like liberty to set and let for three lives, if she should not survive James Erissey and Mary his wife; and if she did survive them, then after their death she was to have the Barton of Clabar, in the county of Cornwall, and the Barton of Loworthy, in the county of Devon, together with the lands to be purchased with the 1500*l.* for her full jointure; and then the lands of 40*l.* per ann. were to be and remain to the heirs of the body of Richard Erissey, and then to descend as the other lands after mentioned. — And James Erissey agreed to make a settlement of all his freehold lands, except the conventional rents of 40*l.* per ann. to be settled as above, in manner following; viz. To the use of himself for life, without impeachment of waste, and with power to grant leases, determinable upon lives, or for 21 years outright; and after his death, as to several parts of these lands particularly mentioned in the articles, to the use of Mary his wife, for her life, with liberty to grant leases for years, determinable on one, two, or three lives, or for 21 years outright, of part of the same premisses: And after the death of James Erissey, as to the other lands not limited to Mary, nor to Richard and

2 Wms. 349.
Comyns Rep.
412.
Viner, vol. 15.
p. 286. ca. 3.
294. ca. 13.
2 Eq. ab. 39.
ca. 2.
Forrester 20.
Ferne's con-
tingent re-
mainders 66.
75.

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and *Frances* for their lives respectively, the same should be to the use of *Richard* for his life, without impeachment of waste; and after the death of *James* and *Mary* his wife, the premisses limited to *Mary* should likewise be to the use of *Richard* for his life, without impeachment of waste; and to his heirs male to be begotten on the body of *Frances*; and in default of such issue male, then to the heirs male of *Richard*, to be begotten on the body of any other wife; and in default of such issue male, then to the heirs female of *Richard*, lawfully to be begotten, with other remainders over.— And it was agreed, that *Richard Erisey* should have liberty to make leases of his estate for years, determinable on one, two, or three lives, or for 21 years outright:— And he was also to be at liberty to nominate counsel, for settling the estate and jointure aforesaid, and *Sir Peter Killegrew* to advise with his counsel, that the same might be effectual in law.

By indentures of lease and release dated the 23d and 24th of *March*, 1685, between *James Erisey* of the first part, *Hugh Boscawen* and *Arthur Fortescue*, Esqrs. of the second part, and *Richard Erisey* of the third part; the said *James*, in consideration of love and affection for *Mary* his wife, and for confirming her former jointure, and settling an additional jointure upon her; and also in consideration of love and affection for *Richard*, and for settling and entailing the manors and lands after mentioned in the name and blood of the said *James Erisey*, and in pursuance and performance of his part of the above articles; did grant and release to the said *Hugh Boscawen* and *Arthur Fortescue*, and their heirs, the manor, capital messuage, *Barton*, farm and demesne lands of *Erisey*, in the county of *Cornwall*, and several other lands and hereditaments therein particularly mentioned, in the counties of *Cornwall* and *Devon*, to the use of himself for life, without impeachment of waste; remainder, as to part of the premisses, to the use of *Mary* his wife, for her life, for her jointure; and as those respective estates should determine, to the use of *Richard Erisey* for his life, without impeachment of waste; remainder to the use of the first and other sons of *Richard*, by *Frances Killegrew*, in tail male successively; remainder to the use of the first and other sons of *Richard*, by any other wife, in tail male successively; remainder to the use of the heirs of the body of *Richard* by the said *Frances*; remainder to the use of the heirs

heirs of the body of *Richard Erissey*; with other remainders over. — With powers for *James Erissey*, *Mary Erissey* and *Richard Erissey* successively, to make leases for lives or years in manner therein mentioned: And a power for *Richard*, after the death of *James* and *Mary* his wife, to limit certain parts of the estate to any other wife, in case of failure of issue of this marriage; or to charge the same with an annuity of 100*l.* per ann. for the life of such wife or wives.*

And by other indentures of lease and release dated the 25th and 26th of *March*, 1686, between *James Erissey* of the first part, *Sir Peter Killigrew* and *Arthur Fortescue* of the second part, and *Richard Erissey* of the third part; the said *James Erissey*, for the like considerations as were mentioned in the other settlement, and in pursuance and performance of his part of the articles, did grant and release unto *Sir Peter Killigrew* and *Arthur Fortescue* and their heirs, the several manors, lands and hereditaments therein particularly mentioned in the county of *Cornwall*, to the use of *Richard Erissey* after the marriage, for his life, without impeachment of waste; remainder to the use of *Frances Killigrew* for her life, if *James Erissey* and *Mary* his wife, or either of them should so long live; remainder to the use of the first and other sons of *Richard* by *Frances*, in tail male successively; remainder to the use of the first and other sons of *Richard* by any other wife, successively in tail male; remainder to the heirs of the body of *Richard* by *Frances*; remainder to the heirs of the body of *Richard*; with such other remainders over as in the other settlement. — With a power for *Richard Erissey* and *Frances* his wife, and the heirs male of their bodies, and other persons in remainder, being in possession, to make leases for one, two, or three lives, reserving the old accustomed rents.

* That part of the deed wherein this latter power was written, appeared to be very much razed; three lines, part of the power, were written upon the rasure, and the rest of the rasure, containing four lines and a half, was filled up with several small strokes, or lines. And therefore upon the execution of this deed, the following words were written on the back of it; viz. "*Memorandum*, "That by the mutual consent and agreement of all the parties within named, the "razure and amendment in the last sheet was made and filled up in that particular, "which limits the power of *Richard Erissey*, to lease or charge the *Barton* and "demesne lands of *Erissey*, with any jointure or yearly payment; and then sealed "and delivered in the presence of *Peter Killigrew*, *George Killigrew*, *John Harris*, "Francis Heyme."

On the 28th of the same month, Sir Peter Killegrew wrote the following letter to Richard Erisey: SIR, I find that it is absolutely necessary to have the great settlement copied out, and signed and sealed by your uncle and yourself before your marriage, to remain in my hands, as is reasonable, and that there may be at least one of those writings without any razures and memorandums: Mr. Draper tells me you may make twenty of these writings originals, if they bear all the same date. I send my servant on purpose to desire you to bring the writing with you, if we shall have your company this Monday, or else to deliver it to the bearer, that I may have it copied this week by Mr. Draper's son; and on Easter Monday, God willing, I and my son will dine at Erisey, in our way to Clowance, and your uncle and you may sign and seal this writing, leaving the other in your hands. My wife desires the wedding may be on the 20th of April. I am ever, your affectionate servant and cousin, Peter Killegrew.

The marriage between Richard Erisey and Frances Killegrew, soon afterwards took effect, and thereupon 200*l.* part of the 1700*l.* was paid to James Erisey, but the 1500*l.* residue was never paid, either to James or Richard: Sir Peter Killegrew however, gave his bond for it to Richard Erisey, which was afterwards assigned by him for the benefit of his wife Frances.

In November, 1692, James Erisey died; and in January, 1697, Richard prevailed with Mary the widow of James, to surrender her jointure estate to him.

There being no trustees in either of the settlements to preserve contingent estates, as usual in cases of the like kind; Richard Erisey, in Easter term, 1698, suffered two common recoveries of the premisses; and by deed, declared the uses thereof to him and his heirs; he afterwards sold several parts of the estates, to the value of 6000*l.* and upwards: And by indentures of lease and release, dated the 15th and 16th of February, 1709, he conveyed the residue to Samuel Trefusis, John Worth and Thomas Hearle, Esqrs. and their heirs, in trust for himself for his life; and after his death, to and for such uses and purposes as he should by his last will, or other instrument under his hand and seal, attested by two or more witnesses, appoint; and in default thereof to the use of his right heirs.

Richard

Richard Erissey had no issue male by *Frances* his wife, and only one daughter named *Mary*, who was born before the recoveries were suffered; she afterwards married *John West*, and they had issue the appellants their only children. *Mary* the mother died in *January*, 1715.

On the 20th of *December*, 1722, *Richard Erissey* made his will, and thereby gave to the appellants his grand-daughters, 20*l.* to be divided between them, in lieu of mourning, to be paid at the end of 13 calendar months after his death, if they should be then living; provided, that no trouble in law or equity should be given to his executrix by any person whatsoever: He gave to the appellant *Frances West*, if she should outlive her grandmother, the testator's wife, and the said *John West* her father, 20*l. per ann.* for her life; the first payment to be made at the end of the year after their decease, provided no trouble in law or equity should be given to his executrix. He also gave to the appellant *Frances*, all his right, title and interest, to a bond of *Sir Peter Killigrew's* for 1500*l.* then in the possession of *Frances* his wife, for the enjoyment of the yearly interest thereof, for her maintenance; but if any trouble in law or equity should be given to his executrix, he gave all his interest in this bond to her. — He then gave the residue of the estates which remained unfold, to the respondent *Mary Erissey* his sister, and her heirs; except a small tenement, parcel thereof, in trust for the respondent *Thomas Barrable*, and made the respondent *Mary Erissey* sole executrix of his will, and gave her all his personal estate.

In the month of *January* following, *Richard Erissey* died, and left a personal estate to the value of 7000*l.* and upwards; all, or the greatest part whereof was acquired by sale of several parts of the settled estates: Whereupon the respondent *Mary Erissey* entered on the real estate which remained unfold, except what was in jointure to the said *Frances Erissey*, and possessed herself of all the testator's personal estate.

In *September*, 1725, the appellants, who were the only daughters and issue of *Mary West*, who was the only daughter and issue of *Richard Erissey* by *Frances* his wife, exhibited their bill in the Court of Exchequer, against the respondents and *Thomas Hearle* and *John Worth*, the surviving trustees; insisting, that
it

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it was the intent of the marriage articles and of the parties thereto, that the estate in question should be settled in strict settlement; viz. to the use of the said *Richard Erissey* for his life, without impeachment of waste; with the usual and common provision to preserve contingent remainders; and then to the use of the first and other sons of the said *Richard* by the said *Frances* in tail male successively; remainder to the first and other sons of the said *Richard* by any other wife, in tail male successively; remainder to the daughters of the said *Richard* by the said *Frances* in tail general; and that it should not be in the power of *Richard* to bar either the sons or daughters of the marriage, by fine, common recovery, or otherwise: That the limitations in the two settlements, under which *Richard Erissey*, by construction of law, became tenant in tail, and the omission therein of trustees to preserve contingent estates, proceeded from the mistake, or carelessness of the counsel who drew the same, and not from any agreement or intent of the parties to vary the terms of the marriage articles; for that the settlements were expressly mentioned to be made in pursuance and performance of the said marriage articles: That the parties did not come to any new agreement to vary the terms thereof; and therefore the appellants, who were in the nature of purchasers in consideration of their grandmother's marriage and marriage portion, prayed that the respondent *Mary Erissey*, as a volunteer under the will of *Richard*, might execute a settlement pursuant to the intent of the marriage articles, and make satisfaction for the lands sold by *Richard Erissey*, out of his personal estate, who took advantage of the mistakes in the settlements, and suffered the recoveries to bar the issue of the marriage, contrary to the intent of the articles.

To this bill the respondents put in a plea and answer, and pleaded the marriage articles, the two settlements, the common recoveries suffered by *Richard Erissey*, the deed to declare the uses thereof, and the devise by his will to the respondent *Mary Erissey*, of the estate which remained unfold, in bar of the relief sought by the bill; and by their answer denied that they ever pretended, that the parties came to any new agreement, to vary from the terms of the marriage articles.

Upon arguing this plea on the 21st of May, 1726, before the Lord Chief Baron Gilbert and the rest of the Barons, they all delivered

delivered their opinions *seriatim*, that according to the marriage articles, the estate in question ought to be settled in strict settlement; and that the two settlements having varied from the articles, the same were not an execution thereof; and therefore ordered, that the plea should stand for an answer, with liberty to except.

The appellants having no occasion for a further answer, replied, and witnesses being examined on both sides, the cause was heard on the 6th, 9th, and 12th of December, 1726; when the Court was pleased to dismiss the appellants bill without costs.

From this decree of dismissal, the present appeal was brought; P. Yorke. and on behalf of the appellants it was argued, that by the C. Talbot. marriage articles it was expressly stipulated, that the estate should be limited to *Richard Erisey* for his life, without impeachment of waste, and that he should have power to make leases; which was a plain evidence of the intent of the parties, that the estate should be settled in strict settlement; and that *Richard* should be only tenant for life, and have no power to bar either his sons or daughters by fine or recovery. That the settlements took notice of the articles, and were expressly mentioned to be made in pursuance and performance thereof; which words were an evidence, that the parties did not intend to vary, or depart from the words of the articles, nor had come to any new agreement for that purpose. And it was apprehended, that the limitations in the settlements, under which *Richard Erisey* by construction of law became tenant in tail, proceeded from the mistake or negligence of the counsel who drew the same, and not from any agreement or design of the parties to vary the terms of the articles; and of this mistake or neglect, the omission of the common limitation to trustees to preserve contingent estates, was a manifest proof. That the respondent was a volunteer under the will of *Richard Erisey*, who took advantage of the mistakes in the settlements, and suffered a common recovery to bar his issue, altho' *Mary* was then living; which was apprehended to be a breach of trust in him. It is objected, that tho' Courts of Equity have, in like cases, decreed an execution of marriage articles in strict settlement in favour of sons, yet they have not extended it in favour of daughters; who are most commonly provided for by a term of years to raise portions

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for them, in case of failure of issue male: But to this it may be answered, that the reason seems to be as strong, that the expression of heirs female of the body, contradistinguished from sons, in marriage articles, should have the same construction in favour of daughters, as the expression of heirs male in favour of sons. That in the present case, both were under the contemplation of the parties, because there was no other provision for daughters, besides the limitation intended for them by the articles; and according to the common course, where provision is made for daughters by a term of years, it is always so limited, as to be out of the father's power to bar it. It is further objected, that the settlements being made before the marriage, it must be presumed that the parties came to a new agreement to vary the terms of the articles; and that the settlements were made to the satisfaction of Sir Peter Killigrew, he being a witness to the one, and a party to the other. To this it is answered, that the settlements are not only expressly mentioned to be *in pursuance and performance of the articles*, but the appellants having charged by their bill, that the parties came to no new agreement after the date of the articles to vary the terms of them; the respondent *Erisey*, by her answer admitted, that she never set up a pretence of any such new agreement. And as to Sir Peter Killigrew's being a witness to one settlement, and a party to the other, he, as most gentlemen in like cases do, relied upon his counsel in framing the settlement, so as to answer the intent of the articles, he himself being a stranger to the form and method of so doing. As to the objection, that after such a length of time, and an acquiescence under the settlements, the appellants ought not now to resort to the marriage articles; it was said, that the appellants were infants, that their title did not accrue until the death of *Richard Erisey* their grandfather in *January, 1722*, and that they filed their bill for relief within a short time afterwards. And as to a fourth objection, that if the marriage articles should be allowed to controul and vary the settlements, it would affect the purchasers under *Richard Erisey*; it was answered, that the appellants had not brought their bill against any purchaser: But as to those parts of the estate which were sold by *Richard*, they only prayed to have a satisfaction for the same out of his personal estate, which was principally acquired by means of those sales, and in breach of trust. Besides, by the conditions which in his will he had annexed

annexed to the trifling and fruitless bequests to the appellants, his granddaughters and heirs at law, he seemed to be aware of the injury he had done them, and that his personal assets would be liable to their demands in respect thereof. It was therefore hoped, that the decree of dismissal would be reversed; and the appellants relieved, agreeable to the nature of their case.

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On the other side it was contended, that there was no precedent of a Court of Equity having interposed to carry articles into strict settlement, in favour of heirs female in any case; and much less in a case of this nature, where part of the consideration of both the settlements was, the continuance of the name of the *Eriseys*, which could not subsist long in females; and where the remainder limited to them, was to commence after failure of issue male of *Richard Erisey* by any other wife, and consequently after an estate tail in him; which remainder is of no account in the law, as being subject to be every day barred by the tenant in tail in possession. That the settlements being both made before marriage, and prepared by *Sir Peter Killigrew's* own counsel, and the parties having maturely deliberated thereon, as appeared by the rasure in the first settlement, and *Sir Peter's* letter; it was evident, that the parties fully agreed to the settlement as now made, and if the same varied from the terms of the articles, it ought to be taken as a new agreement; and the articles being carried into execution by a settlement formally and deliberately made, previous to the marriage, the parties ought to be bound and governed thereby. That the bill was not brought against *James Erisey*, who was to perform the covenant, or against his heir at law; but against the respondent, as devisee of *Richard*, who did not appear to be, nor was the heir to *James*; whereas nothing moved from *Richard*, he being to take such estate and interest only, and in such manner as *James* thought fit to settle upon him. That it would be dangerous to the purchasers of the several estates sold by *Richard Erisey*, if by the two common recoveries he could not bar the estates tail and remainders; for the purchasers could not purchase but under and with notice of the two settlements, they being his only title; and it being said in both of them, that they were made in pursuance and performance of the articles, the purchasers must consequently have had notice of those articles. That the decree contended for by the appellants, might shake very many settlements made

T. Lutwyche.

N. Fazaker-

ley.

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even before marriage, where there happened to be any variation from the articles; tho' such variations really proceeded from a new agreement between the parties, which, after some distance of time, it might be very difficult to prove. And as to the omission of trustees to preserve the contingent remainders, it was very difficult to account for every omission in the limitations of a settlement, and especially at so great a distance of time; but as to this omission, there had no inconvenience ensued; and tho' the intention had been to secure an estate tail to the son, it did not follow that it should be so for the daughters; neither was it so usual to settle an estate in strict settlement upon daughters, as upon sons; nor did it appear to be the intention of the parties in this case, but rather the contrary, from the different manner of wording the limitations in the settlements: And therefore it was hoped, that the decree would be affirmed, and the appeal dismissed with costs.

DECREE
reversed.
Jour. vol. 23.
p. 186.

BUT, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of, should be reversed: And it was further ORDERED and ADJUDGED, that the defendants *Worth* and *Hearle*, and the respondent *Mary Erisey*, should convey such of the lands contained in the marriage articles of the 23d of *December*, 1685, as were conveyed to the said *Worth* and *Hearle* and *Samuel Trefusis*, Esq; deceased, and their heirs, by the deeds of the 15th and 16th of *February*, 1709, and had not been sold, to the appellants *Mary* and *Frances West*, and to the heirs of their bodies, as tenants in common; with cross remainders to each of them, and the heirs of their bodies respectively; remainder over to the other uses limited in the said marriage articles, after the limitation to the heirs female of the said *Richard Erisey* lawfully begotten: And that the respondents *Mary Erisey* and *Thomas Barrable* should severally account for the rents and profits of the said lands, grown due since the death of *Richard Erisey*, and which had severally come to their hands, wherein they were to have all just allowances, and to be examined upon interrogatories, as the Court of Exchequer should direct; and after such account taken, should severally pay what should be found due from them respectively to the appellants; and that they should severally deliver possession of the said lands to the appellants, and bring into the Court of Exchequer all deeds, evidences and writings, in their several custodies, power or possession, relating to the title of the said

faid lands, or of any of them, to be disposed of as the said Court should direct: And it was further ORDERED and ADJUDGED, that the Court of Exchequer should cause an account to be taken of all the lands contained in the said marriage articles, sold by *Richard Erisey*, and the purchase money for which they were sold, and compute interest for the purchase money from the death of *Richard Erisey*; and that the respondent *Mary Erisey*, as the executrix of the said *Richard Erisey*, should pay and satisfy the said purchase money and interest, out of the assets of the said *Richard Erisey* come to her hands; and if she should not admit assets, then an account was to be taken of assets, wherein she was to have all just allowances, and be examined upon interrogatories, and produce all books, papers and writings relating to the testator's estate, as the Court should direct; the said interest was to be paid to the appellants, and the said purchase money to be laid out in a purchase of lands, to be settled to the same uses as the lands before mentioned; and the Court of Exchequer was to give all necessary and proper directions for the making this judgment effectual.

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Dorothy Love, Widow, and *Emma Gorbell*, Widow, } Appellants. Case 49.

Henry L'Estrange, Esq; *Gawen Nash*,
Francis Hill and *Frances* his Wife,
William Smith and *Mary* his Wife, } Respondents.
Jane Nash, Spinster, *Henry Nash* and
Susan Nash,

19th of February, 1727.

WALTER Walterfon, by his will, dated the 22d of December, 1720, after giving several legacies, bequeathed the residue of his personal estate in these words, viz. "And I hereby give and bequeath unto my said loving friend Sir *Nicholas L'Estrange*, and unto *Henry L'Estrange* his youngest son, whom I make the executors of this my will, all the rest and residue of my goods, chattels and personal estate whatsoever,

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“as shall remain after all my debts, legacies, funeral and other
 “charges of the said executorship and trust of this my will
 “fully paid and satisfied, and this my will fully performed,
 “according to the true intent thereof; in trust to sell, dispose
 “and improve the same to the best advantage, as in their judg-
 “ments and discretion of them and the survivor of them, and
 “the executors and administrators of such survivor, whereunto
 “for gain or loss, the same is hereby wholly referred; until
 “*Walter Nash* of *Docking* in the said county shall attain his
 “age of twenty four years: It being my desire, that he shall
 “be employed wholly in his trade, either as an apprentice
 “according to his present indentures, or as a journeyman,
 “until his said age, upon trust in my said loving friends
 “reposed; and from the age of twenty one years of the said
 “*Walter Nash*, out of the said residue to pay him an annuity
 “of 10*l.* yearly, until his age of twenty four years; and from
 “thenceforth, in trust for him the said *Walter Nash*, his
 “executors, administrators and assigns; and the accounts of the
 “said residue to be given by my said trustees, to be binding
 “and conclusive to him, without exception, or any question
 “at all to be made by him or them therefore.”—And the
 testator, by his said will, gave to the said *Sir Nicholas L'Estrange*
 and *Henry L'Estrange*, his executors, fifty guineas, provided
 they would undertake the executorship and act therein.

In *March*, 1721, the testator died without issue; and the
 executors proved the will and possessed his personal estate, the
 surplus whereof amounted to about 5000*l.*; and afterwards *Sir*
Nicholas L'Estrange died.

Walter Nash attained his age of 21, but died before his age
 of 24, intestate and a bachelor; whereupon the respondents
Henry Nash and *Susan Nash* obtained letters of administration
 of his personal estate.

In *Michaelmas* term, 1725, the respondents *Garwen Nash*,
Francis Hill and *Frances* his wife, *William Smith* and *Mary* his
 wife, and *Jane Nash*, exhibited their bill in the Court of Chan-
 cery against the said *Henry Nash* and *Susan Nash*, as admin-
 istrators of the intestate, and against the said *Henry L'Estrange*
 the surviving executor of the testator, to have an account of the
 said intestate's estate, and that they might have their share
 thereof.

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thereof, as being his next of kin; and also to have an account of the personal estate of the testator *Walter Walterfon*, and that the residue thereof might be paid to them and the said intestate's administrators; insisting, that such residue vested in *Walter Nash*, altho' he died before his age of 24, and so belonged to his administrators and next of kin.

The respondent *Henry L'Estrange*, by his answer, set forth what the residue of the testator's personal estate amounted to, and said he was ready to pay the same as the Court should direct. And the respondents *Henry Nash* and *Susan Nash* by their answer, insisted, that such residue belonged to the next of kin of the intestate, and ought to be paid to them as his administrators.

But in *Hilary* term following, the appellants exhibited their cross bill against the respondents, for an account of the testator's personal estate, and to have the residue thereof paid to them, as they were the next of kin of the testator; insisting, that *Walter Nash* dying before his age of 24, such residue did not vest in him, but belonged to the next of kin of the testator.

The respondent *Henry L'Estrange* submitted to the judgment of the Court, to whom such residue belonged; whether to the appellants, as next of kin of the testator, or to the other respondents, as next of kin of *Walter Nash*; and was ready to pay the same as the Court should direct. And the other respondents insisted, that such residue belonged to them, as next of kin of *Walter Nash* the intestate.

On the 3d of *August*, 1726, both causes came on to be heard before the Lord Chancellor *King*, when his Lordship was pleased to decree, that the respondent *Henry L'Estrange* should account before the Master for the testator's personal estate, and for the profits and increase thereof; and that he should pay and deliver over to the respondents *Henry Nash* and *Susan Nash* the surplus of such estate, and the securities belonging to the same, after payment of his debts, legacies and funeral expences; and all parties to the said suits, except the appellants, were to have their costs, which the Master was to tax. And the respondents *Henry Nash* and *Susan Nash*, the administrators of the intestate, were to divide the remainder of the monies in their hands, or which should come to their hands, of the testator's personal estate,

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estate, after payment of the costs, into six equal parts, to and amongst the six next of kin of the said *Walter Nash* the intestate, viz. To retain to each of them the said *Henry* and *Susan Nash*, one sixth part thereof; and to pay one other sixth part to the respondent *Gawen Nash*, another sixth part to the respondent *Hill* and his wife, another sixth part to the respondent *Smith* and his wife, and the other sixth part to the respondent *Jane Nash*; and that the bill brought by the appellants should be dismissed, but without paying any costs in respect thereof.

P. Yorke.

W. Peere
Williams.

From this decree the appellants appealed; insisting, that by the testator's will it appeared, he never intended that *Walter Nash* should be entitled to any advantage by the bequest of the residue of his personal estate, save only to the provision of 10*l.* a year, until his age of 24; and that the right or property of such residue, was not to vest in him till that time. And as *Walter* died before he attained that age, and before any title to the residuary estate vested in him, the benefit of the devise could not belong to his representatives; but ought to be considered as a lapsed legacy, and undisposed of by the testator's will, and consequently belonged to the appellants, as his next of kin, and as not being given from them by the will.

C. Talbot.

T. Lutwyche.

On the other side it was contended, that the bequest of the residue of the testator's personal estate, after debts and legacies paid, was absolute and unconditional; and the trust being declared for *Walter Nash*, in the manner mentioned in the will, the equitable right to such residue, vested in him immediately upon the testator's death. And tho' he died before he attained 24, such right was transmissible to his proper representatives, the age of 24 being mentioned, not to prevent the right from vesting in *Walter* before that age, but to direct the trustees as to the time of paying it to him. That there was no material difference between a money legacy given to one absolutely out of a personal estate, to be paid at a future day, (where it has always been held, that such a legacy became vested, and would belong to the proper representative of the legatee, altho' such legatee should die before the day of payment) and the present bequest of the residue to the executors, upon the trust before mentioned. And therefore it was hoped, that as the decree was just, and according to the rules of equity, it would be affirmed, and the appeal dismissed with costs.

ACCORD.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

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DECREE affirmed.
Jour. vol. 23.
p. 188.

Robert Dillon, Esq; and Susannah Lady } Appellants. Case 50.
Shaen his Wife, - - -

The Right Honourable Catherine Lady }
Viscountess Dowager Mount Casbell, }
Morgan Magan, Esq; and Frances, } Respondents.
Elizabeth and Susannah Shaen, In- }
fants, - - -

20th February, 1727.

SIR Arthur Shaen, Bart. being seised in fee of a real estate of the yearly value of 1300*l.* and possessed of a personal estate to the amount of 16,000*l.* or 17,000*l.* did, in the year 1717, being then advanced in years, intermarry with the appellant the Lady Shaen, then Susannah Magan, the respondent Morgan Magan's eldest daughter, with whom Sir Arthur had 4000*l.* portion.

9 Mod. 135.
by the name of
Morgan v.
Dillon.
Viner, vol. 11.
p. 432. c. 25.
26.
2 Eq. ab. 453.
ca. 7.

By articles previous to the marriage, dated the 23d of December, 1717, Sir Arthur Shaen agreed, that the appellant the Lady Shaen should have 500*l.* per ann. jointure, issuing out of his real estate, in case she survived him; and that his real estate, chargeable with such jointure, should be settled to the use of himself for life, remainder to his first and every other son, to be begotten on the body of the appellant, in tail male successively, according to the usual form of family settlements.

The appellant Lady Shaen behaved herself with great tenderness and affection towards her husband, and by him had issue three daughters; namely, the respondents Frances, Elizabeth and Susannah Shaen.

By an act of Parliament passed in Ireland, 14 & 15 Car. II. entitled, *An act for taking away the Court of Wards and Liveries*, Vol. III.

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and tenures in capite, and by Knight's service, to the same effect with an act passed in England, 12 Car. II. Sir *Arthur* was enabled to dispose of the guardianship of his children by his will.

Accordingly on the 26th of September, 1724, Sir *Arthur* made his will, and thereof appointed his Lady sole executrix; and devised to her, by the name of his dearly beloved wife, *Susannah Lady Shaen*, one third part of his personal estate, and 100*l.* per ann. in addition to her jointure provided for her by her marriage articles; and thereby left it at her election, to pay all his debts and legacies out of his real, or personal estate; and devised, that in case he should have no son, his real estate should be equally divided between his three daughters, *Frances*, *Elizabeth* and *Susannah*, and their heirs; and appointed 100*l.* per ann. maintenance for each of them, until their respective marriages, or ages of 21, and appointed his Lady their guardian.

Sir *Arthur Shaen*, on the 24th of June, 1725, made and executed a codicil to his will, and thereby devised, that in case his three daughters should die without issue, the appellant his Lady should have all his real and personal estate in the kingdoms of *England* and *Ireland*, to her and her heirs for ever; and soon after died.

After the death of Sir *Arthur*, the appellant Lady *Shaen* with her children lived for some time with the respondent *Morgan Magan* her father; but she having afterwards intermarried with the appellant *Robert Dillon*, her father was pleased to express so much dislike thereat, that the appellants were forced to remove from his house, and to leave the three children with him; and he also detained all the plate which belonged to Sir *Arthur Shaen* in his life-time.

Mr. *Magan*, with a view to have the management of the children and their estate and fortune, did, on the 7th of March, 1725, petition the Lord Chancellor of *Ireland*, praying his Lordship to order, that he the said *Morgan Magan*, or such other person as his Lordship should think proper, might be assigned guardian to the minors, and have the care and tuition of their persons, and the management of their estate and fortunes; and that the care, custody and tuition of them might be committed to him, or such person as his Lordship should appoint, upon his

his entering into a recognizance with security, as by the standing order of the Court was directed. Whereupon it was ordered, that the appellant Lady *Sbaen*, should shew cause the first feal before the then next *Easter* term, wherefore the said *Morgan Magan* should not be appointed guardian to the minors as desired; and that in the mean time, the said minors should continue under his custody and care.

By an order dated the 12th of *May*, 1726, it was ordered, that the order of the 7th of *March* should be discharged, and that the minors should remain where they then were, viz. in the custody of the said *Morgan Magan*, until the further order of the Court to the contrary; with liberty for the Lady *Sbaen* to visit them, when and as often as she should think fit: And his Lordship was pleased to direct, that the names of some of the nearest relations of the said minors, to whom their estate could not descend, and who were of distinction and fortune, should be given to his Lordship; and that he would then appoint some person to take care of their persons and education.

And by another order of the 27th of the same month, it was ordered, that the right honourable *Catherine*, Viscountess Dowager *Mount Cashell*, should be appointed guardian to the said minors *Frances*, *Elizabeth* and *Susannah Sbaen*, to take care of their persons and education; upon her giving security by recognizance, such as one of the Masters of the Court should approve of, conditioned that the said minors, or any of them, should not be disposed of in marriage by the said Lady *Mount Cashell*, or that she should not be privy or consenting thereto, without the leave of the Court; and that the appellant, the Lady *Sbaen*, should have liberty to visit them, when and as often as she should think fit.

Pending the proceedings on the petition for the guardianship of the children, the said *Morgan Magan*, on the 26th of *March*, 1726, procured a bill to be filed in the Court of Chancery in *Ireland* against the appellants, and the tenants of Sir *Arthur Sbaen's* estate and others, in the name of the minors by *Thomas Magan* his son, their *procchein amy*, charging the appellants with misapplication of Sir *Arthur Sbaen's* estate, and praying a discovery and account of his real and personal estate; that a receiver might be appointed thereof, and that the personal estate might

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might be divided according to Sir *Arthur's* will : And charging that the appellants were suing at law for the plate and part of the assets of Sir *Arthur*, which were in the hands of the said *Morgan Magan*, an injunction was prayed to stop such proceedings at law, and any other suit for the said personal estate. And on the appellants taking out a *dedimus* to put in their answer, the plaintiffs obtained an injunction, as of course, according to the prayer of their bill.

The appellants by their answer, set forth the whole personal estate come to their hands, and also the rents of the real estate, with the tenants names ; and insisted, that they had not, since the death of Sir *Arthur*, received so much of the rents as answered the 600*l.* *per ann.* due to the appellants ; they also fully denied any misapplication of Sir *Arthur Shaen's* estate, and insisted, that the appellant Lady *Shaen* being sole executrix of her said husband's will, and having thereby power to pay his debts out of the real or personal estate, as she thought fit, and being likewise testamentary guardian to the minors ; she had in both capacities, a right to the receipt of the rents and management of the personal estate during their minorities.

The tenants refusing to pay their rents to the appellants, altho' they had not received so much as was due to them on account of Lady *Shaen's* 600*l.* *per ann.* ; on affidavit made thereof, it was, on the 21st of *July*, 1726, ordered, that the appellants should be at liberty to distrain for the rents and arrears of rent of the said estate, notwithstanding the injunction.

Soon afterwards the plaintiffs preferred a petition, setting forth, that when the motion was made on the 21st of *July*, 1726, his Lordship, as they apprehended, declared, that the injunction which had before issued in the cause, was only an injunction to stay proceedings at law as to the plate and other personal assets, and that therefore the motion was needless ; and yet that an order was made upon the said motion, that the appellants should be at liberty to distrain for the rents and arrears of rent of the real estate, notwithstanding the injunction ; and that they were apprehensive the appellants under colour of that order, would oblige the tenants to pay their rents and arrears to them, which were, as they alledged, very considerable, and would not, as they were advised, be safe in the appellants hands, and was not intended by his Lordship ; and

he rather, for that the appellants had given no security to be accountable for the same; and therefore prayed, that the order of the 21st of *July* might be set aside. And this petition being heard on the 28th of the same month, the said order of the 21st of *July* was set aside accordingly; tho' the plaintiffs did not support any of the allegations of their petition, by affidavit or otherwise.

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The plaintiffs having afterwards amended their bill, by praying an injunction against the appellants suing, or distraining for the rents, or molesting the tenants; they again petitioned the Lord Chancellor, setting forth their having so amended their bill, and that the appellants had not put in their answer thereto, and were distraining and harrassing the tenants with an intent to receive their rents; and therefore prayed an injunction to prevent the appellants receiving any part of the rents or profits of the said estates, and distraining, or molesting the tenants till they had answered the said amended bill, and his Lordship's further order to the contrary. Upon the hearing of which petition on the 15th of *September*, 1726, tho' there were no affidavits to support the allegations thereof, it was ordered, that such injunction should issue, unless in a fortnight after service of that order, good cause should be shewn to the contrary; and that the appellants should stop receiving any part of the rents or profits of the said estate, and from distraining, or molesting any of the tenants thereof, in the mean time.

The appellants put in a full answer to the amended bill, and on the 6th of *October*, 1726, came to shew cause against the injunction; when his Lordship was pleased to order, that the said order of the 15th of *September* should be discharged, upon the appellants giving such security by recognizance, as one of the Masters of the Court should approve of, conditioned to account for such part of the rents and profits of the minors real estate as should come to their hands: And it was further ordered, that such security should be given by the first seal before the then next term; or in default thereof, that an injunction should be and was thereby awarded, to stop all proceedings at law against the respondents, for the plate and other effects in the bill mentioned; and to stop all proceedings at law by distress, action of debt, covenant, or otherwise, for recovery of the rents of the minors estate; the same to continue till the appellants should

file full and perfect answers to the bill, and the further order of the Court to the contrary.

On the 9th of *November* following, the plaintiffs moved the Court, that in regard the appellants had given no security, as by the order of the 6th of *October*, 1726, they were directed to do, that the said order might be made absolute; which was ordered, and an injunction awarded accordingly.

These proceedings occasioned two separate appeals by Lady *Sbaen* and her husband Mr. *Dillon*; one, from the several orders made relative to the guardianship of the infants, and the other, from the orders made concerning the testator's personal estate.

C. Talbot.

T. Lutwyche.

In support of the first appeal it was argued, that the appellant Lady *Sbaen* being of the communion of the church of *England*, had an undoubted right to the guardianship of her children by the will of their father; who by virtue and in pursuance of the powers given him by the statute, had regularly devised the sole guardianship of his children to his Lady, their mother and natural guardian; and this will the Court of Chancery had no power to controul, especially as there was not the least ground to complain of any misbehaviour in Lady *Sbaen* towards her children. As to the objection, that Lady *Sbaen* had by the will a remainder limited to her of her children's estate, in case of their death without issue, and that therefore she was not a proper person to have the care and custody of them; it was said, that this objection ought to have had no weight with the Court, as it had none with Sir *Arthur* the father of the children. The right to the guardianship vested in Lady *Sbaen* by Sir *Arthur's* will, and the remainder devised to her by the same will, could not destroy that right; besides, this objection could not ordinarily prevail in any case, against the parent of the children. But Lady *Sbaen's* second marriage had been urged as an objection, because it might lessen her affection for the children, and in time destroy it; this marriage however, did not necessarily infer a prejudice to the children, nor was there any restraint put upon Lady *Sbaen* in that respect by Sir *Arthur's* will, or any limitation of her right of guardianship: Her marriage therefore with Mr. *Dillon*, against whom there was no real objection, was not a sufficient reason for taking away from her

the guardianship which was vested in her, both by the testator's will and the act of Parliament.

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Against this reasoning it was urged, that Lady *Shaen* had entirely quitted and relinquished the minors, and by her marriage with the appellant *Dillon*, had put it out of her power to execute the trust reposed in her by Sir *Arthur Shaen*. That Mr. *Dillon* had greatly mismanaged his own fortune, and being thereby in very needy circumstances, was a very improper person to be trusted with the persons or fortunes of the minors. That Lady *Shaen* having a remainder limited to her of the minors estate, upon their dying without issue, was the less proper to be their guardian; and had it not in her power, were she ever so well inclined, to take the necessary care of their health, maintenance and education. And lastly, that it might be of the utmost ill consequence to the minors, to be put into the hands of the appellant *Dillon*; because his interest was apparently inconsistent with theirs.

P. Yorke.

N. Fazakerley.

In support of the second appeal it was insisted, that Sir *Arthur Shaen* having by his will, pursuant to the power given to parents by the statute made in *Ireland*, 14 & 15 Car. II. appointed the appellant Lady *Shaen* guardian to the minors; and it being by that act expressly provided, that the person to whom the custody of such minors should be devised, should and might receive as well the rents and profits of the minors real estate, as the personal estate for their use, and bring such actions in relation thereto, as by law a guardian in socage might do, the appellant Lady *Shaen* ought not to be restrained from exercising the power given to her by that act; nor could she be divested of the estate during the minority of the children, or at least, until she had committed some act in breach of the trusts reposed in her by Sir *Arthur Shaen's* will, and which was not attempted to be made out; nor was there any affidavit to prove, that the respondents even apprehended the rents and profits to be unsafe in the appellants hands: And as neither the testator's will or the act of Parliament required any security, the Court of Chancery ought not to have directed any to be given. That the appellant Lady *Shaen* being executrix of Sir *Arthur's* will, and likewise a devisee of a third part of his real estate, and having authority to pay his debts and legacies either out of his real or personal estate, at her election; she ought not

C. Talbot.

T. Lutwyche.

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not to be turned out of the receipt of either of them, or restrained from the recovery thereof, at least without some misbehaviour, which was not so much as pretended. That an executrix is under no obligation to give any security, nor is it usual for a Court of Equity to compel an executrix, who is intrusted by the testator with his personal estate, to give security; or at least not upon a bare motion, without any affidavit of insolvency or misconduct. That Lady *Shaen* being entitled to 600*l.* per ann. as her jointure out of the real estate, and to 300*l.* per ann. thereout for the maintenance of the minors, she ought not to be restrained from receiving the same, or from taking any legal course for the recovery thereof. And therefore it was hoped, that the said several restraining orders would be reversed.

P. Yorke.

N. Fitzakerley.

On the other side it was contended, that two thirds of the personal estate of Sir *Arthur Shaen* belonged to the minors, and ought to be laid out on good security for their benefit; and that the rents and profits of the real estate, subject to the 600*l.* a year payable to the appellant Lady *Shaen*, likewise belonged to them, and ought to be received and secured for their benefit. That Mr. *Dillon* having mismanaged and spent his own fortune, and being very much in debt, ought not to be intrusted with the receipt or management of the minors estate; and his being either unable or unwilling to give security, for what should come to his hands out of the real or personal estate, plainly shewed that he was not a fit person to be trusted therewith. Besides, the appellants were in contempt for want of a sufficient answer, and the injunction was only to continue until answer, and further order.

ORDERS
reversed.
JOUR. vol. 23.
p. 189.

AFTER hearing counsel on both these appeals, which came on together, it was ORDERED and ADJUDGED, that the several orders therein respectively complained of should be reversed, and the injunction dissolved; and that the custody of the Lady *Shaen's* children should be forthwith given to her, as their guardian; and that the Court of Chancery in Ireland should, out of the money appointed for the maintenance of the children, direct the Lady Viscountess *Mount Cashell* to be satisfied for the time the children were in her custody; and that the said Court of Chancery should appoint a receiver, to continue till the hearing of the cause, or further order of the Court, to collect in

such

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such part of the rents and profits of the real estate, and also the personal estate of the testator Sir *Arthur Shaen*, as had not been received by the appellants, or either of them; and that the said Court should, in the appointment of such Receiver, prefer the nominee of the appellants, in case the person proposed by them should be fit; and the said Receiver should give such security as the Court should direct: And it was further ORDERED, that in the mean time, and until the hearing of the cause, the said Court should order the annuity due to Lady *Shaen*, to be paid to the appellants; and also order payment of the maintenance due by the will unto the children, as the same should grow due; as also payment of the testator's debts and legacies, according to the will; and from time to time give such other orders and directions relating to the testator's estate, and the collecting in and securing the same, as should be just and necessary; and that at the hearing of the cause, the said Court should order and appoint what should appear to them on the whole to be just and proper.

David Chesman and Elizabeth } Plaintiffs
his Wife, — }
Margery Nainby, Widow, Defendant } in Error. Case 51.

22d February, 1727.

IN *Easter* term, 1725, an action was brought by the defendant in error against the plaintiffs in the Court of Common Pleas, on a bond dated the 5th of *October*, 1721, for 100*l.* entered into by the plaintiff *Elizabeth*, when unmarried, to the defendant. To this action the plaintiffs pleaded and set forth the condition of the bond, which was in the words following, viz. "Whereas the above named *Margery Nainby*, at the special instance and request of the above bounden *Elizabeth Vickers*, "is to take her the said *Elizabeth Vickers* for her hired servant, "to attend in her shop, and to inspect her customers there, "and to shew her goods, and further to stand by and assist her "the said *Margery* in her said trade and business of a linen draper;

Viner, vol. 5.
p. 96. note 10
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“ draper; whereby it is presumed, the said *Elizabeth*, if she
 “ continues any length of time in the said service of the said
 “ *Margery*, may become a perfect and knowing person in the
 “ said trade and mystery. And whereas the said *Margery*
 “ *Nainby* consents to hire and take her the said *Elizabeth*
 “ *Vickers*, upon and in consideration only, upon the express
 “ promise and agreement of the said *Elizabeth*, that she shall
 “ not nor will, at any time after she shall have left the service
 “ of her the said *Margery*, set up or exercise the said trade or
 “ mystery of a linen draper, either by herself, or by any other
 “ person or persons in trust for her, or for her use, either
 “ directly or indirectly, in any shop, room or place, within the
 “ space of half a mile of the now dwelling house of the said
 “ *Margery Nainby*, situate in *Drury-lane*, or of any other house
 “ that she the said *Margery Nainby*, her executors or administra-
 “ tors shall think proper to remove to, in order to carry on the
 “ said trade of a linen draper; nor shall she the said *Elizabeth*,
 “ within the same space of half a mile, directly or indirectly
 “ be concerned in, or assist or instruct any other person or per-
 “ sons in the managing and carrying on the said trade, under
 “ colour or pretence of being a servant to such person or per-
 “ sons, or under any other colour or pretence whatsoever:
 “ Which said express promise and agreement, joined with the
 “ good character and opinion that she the said *Margery* hath in
 “ the integrity and honesty of her the said *Elizabeth*, is the
 “ sole consideration and inducement that has obliged the said
 “ *Margery* to take the said *Elizabeth* into her service for the
 “ space of three years. Now the condition of the above obli-
 “ gation is such, that if the said *Elizabeth Vickers* shall act
 “ contrary to and in breach of the above recited promise
 “ and agreement, according to the true intent and meaning
 “ thereof, or of any part thereof; that then and in such case,
 “ the said *Elizabeth Vickers*, her executors and administrators,
 “ shall thereupon pay, or cause to be paid unto the said *Margery Nainby*, her executors, administrators and assigns, the
 “ full and just sum of 100*l.* of good and lawful money of
 “ *Great Britain*, without fraud or further delay; the said sum
 “ of 100*l.* being the consideration money which is computed
 “ the said *Margery Nainby* might reasonably expect with an
 “ apprenticeship to the said trade: That then this obligation to be
 “ void, otherwise to be and remain in full force and virtue in
 “ law.”

"law." — And then the plaintiffs pleaded, that the said *Elizabeth* continued in the service of the said *Margery Nainby* to the 28th of *April*, 1724, and then departed and left the said service; and that the said *Margery* continued to reside and exercise her trade in her said dwelling house in *Drury-lane*, from the time of making the said bond, to the day of suing out the original writ; and that she the said *Elizabeth*, within the space of half a mile from the said dwelling house of the said *Margery*, at any time after the departure of the said *Elizabeth* from the service of the said *Margery*, directly or indirectly, was not concerned in or assisted, or instructed any person or persons whatsoever, in managing or exercising the trade aforesaid, under colour or pretence of being a servant to such person or persons, or under any other colour or pretence whatsoever: And further, that she the said *Elizabeth*, at any time after her departure from the service of the said *Margery*, did not use or exercise the said art or trade, either by herself, or any other person or persons in trust for her, or for her use, either directly or indirectly, in any shop, room or place, within the space of half a mile from the dwelling house of the said *Margery*.

To this plea the defendant *Nainby* replied, that the said *Elizabeth*, from the time of making the said bond, continued and remained in the service aforesaid, and from thence departed and left her said service, as the said plaintiffs above alledged; and that the defendant *Margery Nainby* continued to inhabit, reside and exercise her trade in manner as the said plaintiffs by their plea alledged: But the defendant further said, that the said *Elizabeth*, within the space of half a mile from the dwelling house of the said *Margery*, in the said plea above mentioned, and within nine months after the departure of the said *Elizabeth* from the service aforesaid, did assist and instruct a certain person, viz. the said *David Chesman*, in managing and exercising the trade aforesaid, in the condition above mentioned, against the tenor of the said condition, to wit, in *Drury-lane*, in the parish of *St. Giles in the Fields* aforesaid. And on this, issue was joined.

At the Sittings after *Easter* term, 1725, the cause was tried before the Lord Chief Justice *King*; when, upon full evidence given, and after a full defence made, a verdict was found for the plaintiff in that action.

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In *Trinity* term following, the defendants moved the Court of Common Pleas in arrest of judgment; under pretence, that the bond was void in law: But upon hearing counsel on both sides, the Court unanimously gave judgment for the said *Margery Nainby*; and judgment was accordingly signed, and entered up of record.

The defendants therefore brought a writ of error in the King's Bench; and upon argument in *Hilary* term, 1726, the judgment was affirmed, by the unanimous opinion of all the Judges of that Court.

T. Lutwyche.

J. Strange.

Whereupon they brought a writ of error in Parliament, to reverse both these judgments; and to that end, it was insisted on behalf of the plaintiffs in error, that the bond was void in law, being a restraint of the plaintiff *Elizabeth* in her trade, either as a mistress or servant; and that not only within the space of half a mile from the dwelling house of the defendant, but of any other house, which she, her executors or administrators should think fit to remove to, at any time after the plaintiff *Elizabeth* should have left her service; by which might be meant any part of *England*, or any time during the plaintiff's life. That it would be of dangerous consequence, to allow masters or mistresses to exact or take such bonds from their servants; and in this particular case, the breach was for assisting her husband, which, considering the subjection of the wife to the husband, and which could not well be avoided, made the prosecution on this bond the more unreasonable.

P. Yorke.

E. Whitaker.

On the other side it was contended, that contracts entered into between two persons, to restrain one of them from setting up, or exercising a particular trade or employment, within a certain limited district, and for a valuable consideration, were valid in law, and had been solemnly adjudged to be so. And therefore it was hoped, that the judgments would be affirmed, with costs.

JUDGMENT
affirmed.
Jour. vol. 23.
p. 193.

ACCORDINGLY, after hearing counsel on this appeal, and the unanimous opinion of all the Judges having been delivered, upon a point of law to them proposed; it was ORDERED and ADJUDGED, that the judgment of affirmance given in the Court of King's Bench, affirming the judgment given in the Court of Common Pleas, should be affirmed; and that the record should be

be remitted, to the end execution might be had thereupon, as if no such writ of error had been brought into the House : And it was further ORDERED, that the plaintiffs in error should pay to the defendant in error 40*l.* for her costs, sustained by bringing the said writ of error into the House.

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Richard Baynes, Administrator of *John Fisher*, deceased, in Trust for *Ann Langton* and the said *Ann Langton*, } Appellants. Case 52.

Peregrine Bertie, Esq; and *Elizabeth* his Wife, } Respondents.

28th February, 1727.

ROBERT *Fisher*, grandfather of the appellant *Ann Langton*, having issue three sons, *Robert* his eldest, *John* his second, and *Thomas* his youngest son, and two daughters ; settled his estate in the county of *Cumberland* on *John* his second son and his heirs, setting aside *Robert* the eldest son, and afterwards died.

Robert the son had issue two sons, *Robert* his eldest, who died without issue, and *John* his youngest son, and the appellant *Ann* his only daughter.

John, the second son of old *Robert*, settled at *London*, and applying himself to merchandize, acquired a considerable real and personal estate, to the value of 50,000*l.* and upwards ; and having one son and no other child, frequently declared he would settle his estates in *Cumberland*, on the children of his eldest brother *Robert*.

This *John* had likewise estates at *Low Layton* in the county of *Essex*, and at *Barnes* in the county of *Hertford*, and some leasehold houses in *Wapping* ; and about the 4th of *March*, 1700, died, leaving issue *John*, his only child ; who, after his father's death, produced a paper writing, purporting to be his last will, all written with his own hand, but neither signed or

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sealed by him; and this paper he proved in the Prerogative Court of *Canterbury*, as a testamentary schedule; but there being no executor named therein, *John* the son, on the 19th of *March*, 1706, took out letters of administration with the said paper writing, or schedule annexed, and possessed himself of his father's personal estate, to the amount of 40,000*l.* and upwards.

By this paper writing or will it was recited, that the testator had several estates in the county of *Cumberland*, which he particularly enumerated, and also the several estates in *Essex* and *Hertford*, and at *Wapping*, as before mentioned; and then followed these words, *viz.* "The yearly income of all the above-
 " said, I give and bequeath two thirds thereof to my son *John*
 " *Fisher*, during his natural life, and the other third to my
 " loving cousins, *Robert Fisher* and *John Fisher*, sons of my
 " brother *Robert Fisher*; my said cousins or their agents tak-
 " ing care to manage the estate in *Cumberland*, and my son
 " *John Fisher* taking care of the management of my estate at
 " *Barnes*, *Low Layton* and *Wapping*; and after my son's decease,
 " if he leaves any issue male, I give and bequeath to them my
 " estate at *Barnes* in *Hertfordshire*, and at *Low Layton* in *Essex*,
 " and to my loving cousin *Robert Fisher*, jun. all my estate,
 " with the sheep, and their heirs, at *Brackenthwaite*, *Long-*
 " *thwaite*, *Fletcher's* and *Scale-Hill*, with *Low Holmes* and
 " the *Lake Crommock*. And to my loving cousin *John Fisher*,
 " the son of my brother *Robert Fisher*, I give and bequeath
 " my estate at *Bridechurch*, near *Cockermouth* in *Cumberland*,
 " and 500*l.* in money, when he shall attain the years of 21;
 " and, in the mean time, the interest thereof at 5*l.* per cent.
 " for his maintenance, till he shall attain the said years: If he
 " departs this life, before he attains the said years, then what
 " is left him, *viz.* in land, I will and devise to his brother
 " *Robert Fisher*; and what is left him in money, to his sister
 " *Ann Fisher*. I also give and bequeath to cousin *Ann Fisher*,
 " daughter to brother *Robert Fisher*, 1000*l.* to be paid her at
 " the age of 21 years, and not before, unless she marry before
 " that age, with the consent of her father and mother."

Soon after the testator's death, *Ann Fisher*, with the consent of her father, intermarried with *John Langton*, to whom *John Fisher* the son paid the legacy of 1000*l.* without any objection whatsoever.

Frequent

Frequent demands were likewise made on *John* the son, for the interest of the 500*l.* towards the maintenance of *John Fisher* the legatee, during his minority; but, on account of the expectations they had from *John Fisher* the son, in case he should die without issue, those demands were made in the most easy terms, and without seeming to press for the satisfaction of them.

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In 1719, *John Fisher* the son died without issue; having made his will, and thereby devised his whole real and personal estate to the respondent *Elizabeth*, then his wife, who, after his death, proved his will, and took administration of the goods and chattels of *John Fisher* the merchant, unadministered by the said *John* his son; and by virtue thereof, possessed herself of the whole real and personal estate of her husband, and also what remained of the personal estate of *John Fisher* the merchant; and afterwards intermarried with the other respondent *Peregrine Bertie*.

John Fisher, the legatee, attained his age of 21 in the year 1722, and afterwards died intestate, without issue and unmarried; after whose death, the appellant *Richard Baynes* obtained letters of administration, in trust for the appellant *Ann Langton*, his only sister and next of kin; and thereby became entitled to the legacy of 500*l.* with the interest thereof.

This legacy and interest being frequently demanded from the respondents, without effect, the appellants, on the 23d of May, 1724, exhibited their bill in Chancery, praying a discovery of assets, and to be paid the said 500*l.* legacy and interest.

To this bill the respondents put in their answers, and thereby admitted assets of *John Fisher* the merchant, come to their hands; and issue being joined and witnesses examined on the part of the appellants, the cause was heard before the Lord Chancellor *King*, on the 18th of November, 1726; when his Lordship was pleased to dismiss the appellant's bill, but without costs.

From this decree the appellants appealed, and on their behalf it was argued, that the paper writing having been proved to be good as a will of personal estate, the personal legacies must be paid. That the words of the will were very strong in favour

P. Yorke.
N. Fazakerley.

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of the present demand; but if there was any thing doubtful in them, they ought to receive a favourable construction; as the testator had out of his great wealth given this legacy to one of his nearest relations, for whose family he had made frequent declarations of providing, in case his own son died without issue, as had happened. That this legacy of 500*l.* was in no sort contingent, or to arise upon the death of the testator's son having issue male, in the nature of a condition precedent; but was an absolute and substantive bequest of that sum to his cousin *John*, on his attaining the age of 21; and therefore he gave interest for it, at the rate of 5*l.* per cent. A man may certainly give away his estate, upon a contingency that his son shall have children to enjoy it; and where the words of a will are plain and clear to that purpose, such a bequest must take place; but, as it is a very uncommon contingency, to disinherit because there are children to take, such a construction requires much plainer expressions than are to be found in the present will. And if, in this case, the legacy was to wait in point of vesting, till it should be seen whether the testator's son *John* would or would not have issue male at his death; it would have been absurd either to have made the legacy payable at the legatee's age of 21, or to have given interest in the mean time; because the giving of interest, supposes the principal to be vested, tho' payable at a future day. It was therefore hoped, that the decree of dismissal would be reversed; and that the legacy would be decreed to be paid, with interest.

C. Talbot.

T. Lutwyche.

On the other side it was said, that the single question was, Whether this gift of 500*l.* should be considered as a distinct and independent legacy; or whether, with the devise of the estate at *Bridechurch*, it depended upon the contingency of the son's leaving issue male, which had not happened. The paper writing in question, consisted of two parts; each of which was an entire paragraph, and made an entire distribution. In the first, the testator disposed of the income of his estate at *Lew Layton*, *Brackentwaite*, *Bridechurch*, &c. during the life of his son:—In the second part, he gave, not the income, but the lands themselves, after his son's decease. That the land at *Bridechurch*, and the 500*l.* in money, was one entire legacy; they were both given to *John* the cousin together, and were both given over at the same time: Besides, the testator had valued his estates; and that valuation shewed, that this 500*l.* was

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was added to the estate at *Bridechurch*, to make a nearer proportion between the gifts to the two brothers, than if he had left only the land at *Bridechurch* to *John*. As to the objection, that the 500*l.* was a distinct and independent legacy, because the words, *I give and bequeath*, were repeated; it was answered, that those words were only repeated by way of conjunction and continuation of the whole bequest; they could not put the legacy to *John*, upon different terms from that to *Robert*; they came before the gift of the land at *Bridechurch*, and could not separate the money from the land; nor could the gift of the land be distinct and independent, but must come under the whole contingent distribution; because *John* the son was to have the income of it for his life. And as to interest being given to *John* the legatee in the mean time for his maintenance, it shewed that the testator could not intend it to be a distinct and immediate legacy; because it was apparent from the whole, that the testator did not mean to leave *John* the younger brother, in a better condition than *Robert* the elder. For during the life of the testator's son, both were to have an equal maintenance, viz. one third of the income of the lands between them; and there was no colour to imagine, that the testator intended to give *John* 500*l.* more during the life of his son, after whose death, *John's* maintenance came under the same distribution, and depended upon the same contingency with his brother *Robert's*. That the words, *in the mean time*, could only design the time between the vesting of the legacy and *John's* coming of age; and this construction made the whole writing consistent, both the brothers having an equal share during the son's life, and both an equal chance after his death. That the testator's whole intention was not now discoverable, since he had broke off and left his writing unfinished; what he had left was sudden and imperfect, and it seemed very probable that if he ever reviewed it, he threw it aside, and never thought it could have any effect. What he had given to his cousins, was given in an event which had never happened; and whether he would have left them to the bounty of his son, in case of his having no issue male, or what provision he would have made for them in that event, if he had finished his will, did not appear. And therefore it was apprehended, that such a writing as this, so imperfect and unfinished, was capable of no other construction; and that the appellant *Ann*, who had already received 1000*l.* under it, was not entitled to any more.

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DECREE
reversed.
Jour. vol. 23.
p. 198.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of should be reversed; and that the Court of Chancery should direct an account to be taken of what was due for the 500*l.* legacy given by *John Fisher*, and for the interest of the same from the death of the testator, after the rate of 5*l.* per cent. per ann. and that what should be found due on such account for the said principal and interest, should be paid by the respondents to the appellants.

Case 53. *John Kerrich*, Doctor in Physick, - Appellant.

Bridget Bransby, Widow of *Thomas Bransby*, Esq; *Thomas Bransby*, Esq; Son and Heir and also acting Executor of the said *Thomas Bransby* deceased, and his six other surviving Children, Infants, *Ann Kerrich*, Widow, and *Giles Bladwell* and *Elizabeth* his Wife, - Respondents.

12th March, 1727.

Viner, vol. 8.
p. 169. ca. 14.
2 Eq. ab. 421.
ca. 4.

ROBERT *Bransby*, the only son of *Thomas Bransby*, by *Sarah* his first wife, being seised in fee of the reversion of several freehold lands, expectant on the death of his father who was tenant thereof by the curtesy; and being also seised of some copyhold lands, and of the reversion of some other lands, in all about 65*l.* per ann. And being of sound mind and understanding duly made his will, dated the 18th of March, 1715, and thereby directed, that he should be buried at *Harleston* in *Norfolk*; and as to such worldly estate as it had pleased God to bless him with, he thereby devised and bequeathed the same as follows; viz. To *Mrs. Ann Hartshorn*, twenty guineas to buy her mourning, and to the appellant, by the name of his loving kinsman *John Kerrich*, all other his personal estate whatsoever and wheresoever: And as to the real estate which he should die possessed of, interested in, or any way entitled unto, either in present, reversion, or expectancy, he devised and bequeathed

the same and every part thereof to the appellant, his heirs and assigns for ever; upon special trust and confidence that he did, within six months after the testator's decease, pay off and discharge all his just debts, and the legacy thereby given: And he made the appellant executor.

This will was drawn pursuant to the testator's own directions, and was twice read over to him before it was executed; and the testator approving thereof, deliberately executed the same, and declared himself very well satisfied therewith, and then delivered it to the appellant; who soon after gave it to the said Mrs. *Ann Hartshorn* to be kept by her, (the testator and the appellant then lodging at her mother's house in *Leicester*,) and the same was accordingly so kept till the testator's death, which happened on the 26th of that month.

The appellant, in compliance with the testator's request, was at the expence of carrying his corps from *Leicester*, to be buried near that of his mother at *Harleston*; and then proved the will in the Prerogative Court of *Canterbury*, in common form; and afterwards, upon a contest in that Court with *Thomas Bransby* the testator's father, touching the validity thereof, a sentence was pronounced in the appellant's favour; and he possessed some part of the testator's personal estate, and paid several of his debts, and intended to have paid them all, and likewise the said legacy.

But in *Trinity* term, 1716, the said *Thomas Bransby* exhibited his bill in Chancery against the appellant and the respondents *Ann Kerrich* and *Giles Bladwell* and *Elizabeth* his wife; (the said *Ann* and *Elizabeth* being the aunts and coheirs of the testator) thereby *inter alia*, setting forth, that the testator made his will in *Ireland*, dated the 30th of *September*, 1714, and thereby gave his real and personal estates to the plaintiff his father, whom he appointed sole executor of such will; that he also made another will at *Leicester*, dated the 30th of *January*, 1715, prior to that under which the appellant claimed, whereby he likewise gave his real and personal estate to his father, and appointed him sole executor thereof; of which last will the plaintiff hoped to enjoy the benefit, his son intending it as a satisfaction for the great charges and expences he had sustained in his maintenance and education; but that the appellant and the other defendants pretended, that the said *Robert Bransby* made the
other

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other will of the 18th of *March*, 1715, which the plaintiff charged was gained by fraud and imposition, and that therefore the same ought to be set aside and cancelled.

The appellant by his answer to this bill, denied that the will of the 18th of *March*, 1715, was gained by any fraud, imposition, or undue means; and likewise denied the several instances thereof suggested and furnished in the bill; and insisted on the probate of the will in the Ecclesiastical Court, whereby the personal estate was well disposed of, and that the will was also sufficient to devise the land to the appellant.

The other defendants, the heirs at law, having put in their answers, and issue being joined, and many witnesses on both sides examined; the cause came on to be heard on the 29th of *October*, 1718, before the Lord Chancellor *Macclesfield*; when it was pretended by the plaintiff and endeavoured to be proved, that the testator by his last will intended no other alteration of that of the 30th of *January*, than that his debts should be paid, and Mrs. *Hartshorn* have twenty guineas; that when Mr. *Caldecott*, who drew the will of the 18th of *March*, read it to the testator, he read it as if the real estate had been thereby devised to the plaintiff; and that the appellant assured the testator, that the said will should be burnt, as soon as an account came of the plaintiff's having performed a promise of paying 40*l.* in *London*, to be remitted to *Leicester*, and applied in satisfaction of the testator's debts.

These facts were chiefly supported by the deposition of the said Mrs. *Hartshorn*, but were flatly denied by the appellant's answer; and it appeared by the deposition of several persons, that the testator himself told Mr. *Caldecott*, that he had a mind to alter his will, and give what he had to the appellant; that thereupon Mr. *Caldecott*, in the testator's presence, drew the will of the 18th of *March*, and read it twice over distinctly to him, in the very words therein contained and no other; that the testator approved of, and executed it. Mr. *Caldecott*, in his deposition on the part of the plaintiff swore, that the instructions given by the testator to draw the will, were without any such condition as pretended; and that the same was executed by him without any condition; and Mr. *Bent*, another of the witnesses to the will, in his deposition for the plaintiff swore, that when the

the will was executed, there was not any proposal or agreement made by the testator, or any other person, for the burning or making the same void, either on payment of money, or on any other account. It was therefore insisted, that the evidence given for the plaintiff was fully answered by the evidence on the other side, but if there was any doubt, it ought to be tried at law, as other matters of this kind constantly are; the frauds alledged by the plaintiff being such, as made it appear not to be the testator's will.

The cause being adjourned from the 29th of *October* to the 14th of *November*, 1718, the Lord Chancellor then made his decree; and was thereby pleased to declare, that there appeared to be great fraud and imposition used in obtaining the will of the 18th of *March*, 1715, and that the appellant ought not to take any benefit thereby; and therefore decreed the appellant and the other defendants the heirs at law, to join in a surrender of the copyhold, and in a conveyance of the freehold and other estates of which the testator was seised in possession, reversion, or expectancy, to the plaintiff, his heirs and assigns for ever, as the Master should direct; and that the defendants should account before the Master for the testator's personal estate, and that the Master on such account should make them all just allowances; and what upon such account should appear to be in their hands, was to be paid to the plaintiff, who, if there should be occasion, was to be at liberty to make use of the appellant's name to get in any debts, or other personal estate of the testator; and what upon the said account should be coming to the plaintiff, as also such freehold and copyhold estates, so to be conveyed and surrendered, were to be subject to the testator's debts and legacies; and decreed the appellant to pay the plaintiff his costs; and that upon the defendants the heirs at law joining in such conveyances and surrenders as aforesaid, the plaintiff should pay them their costs to be taxed by the Master.

Although the plaintiff *Thomas Bransby* lived till *January*, 1725, above seven years after the making of this decree; yet he never called for any conveyance or surrender, or took any one step towards carrying it into execution; and as the principal benefit which the defendant *Kerrich* could reap under the last will, was not to arise till after the plaintiff's death, who was

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tenant for life of the real estates, he did not immediately appeal from the decree. But soon after that event happened, two appeals were brought; the one by the defendant *Kerrich* against the decree generally, and the other by the defendants the heirs at law, against so much of it as directed them to join in a conveyance and surrender of the testator's estates.

T. Lutwyche.

N. Fazaker-
ley.

In support of the first appeal it was insisted, that the Court of Chancery ought not to have impeached the will of the 18th of *March*, 1715, so far as it concerned the personal estate, because it had been already established by the proper Ecclesiastical Court, which has the sole jurisdiction of determining wills, so far as they relate to personal estate; and if there had been any fraud or imposition in obtaining the will, it was properly examinable in that Court only. That the validity of the will as to the lands, was properly triable at law; for if it was a fraud and imposition upon the testator, or falsely read to him, or made only upon a condition, it was not his will in point of law, and therefore that question might have been tried in an ejectment; or at least, the Court of Chancery ought not to have made any determination in prejudice of the will, before the validity of it had been determined upon a trial at law. That by the decree, the appellant and the heirs at law were directed to join in a conveyance to *Thomas Bransby*; which supposed the estate to be devised to the appellant and his heirs, or at least that it was well devised for the payment of debts and the legacy; but this, it was conceived, would be a revocation of the former will, under which *Thomas* himself claimed. That there was not a sufficient foundation, either for the declaration in the decree touching the fraud and imposition, or for the several directions thereby given; for it appeared, that the testator had taken a great displeasure against his father, and that the appellant was one of his nearest relations on the part of his mother, by whom the estate in question came to him; that he made frequent declarations of kindness to the appellant, and particularly, that he would make a disposition of his estate in favour of him: Besides, it was fully proved, that the will was drawn according to the testator's own directions, was twice truly read over to him, and afterwards duly and deliberately executed, and then delivered by the appellant himself to *Ann Hartshorn*, who was now a witness to prove that it was read contrary to its purport; and tho' it appeared from her own evidence,

evidence, that she knew of this pretended imposition soon after the making of the will, yet it did not appear that she ever made any discovery of it to the testator, tho' he lived seven or eight days afterwards, and had his senses all the time. That the appellant was decreed to pay the costs of the suit, which, for the several reasons aforesaid, he ought not to have been decreed to pay; and that it would be of dangerous consequence to defeat a written will upon parol evidence, contrary to the purport of such will.

On the part of the respondents, the widow and infant children, it was said to be fully proved in the cause, that *Thomas Bransby* had been a very kind and indulgent father to the testator, and had, from time to time, furnished him with much larger sums of money than his circumstances would admit of; that in consequence of this kindness, the testator took all occasions of expressing his gratitude; and being of an infirm and sickly constitution, he made several wills in his father's favour; particularly one in *September, 1714*, and another on the 30th of *January, 1715*. That it was also fully proved, that the appellant, taking advantage of the miscarriage or delay in the return of some money by *Thomas Bransby* for the testator's use, declared that *Thomas* was a tricking scandalous fellow, and that the pretended disappointment of the return was only a sham to evade the payment of his son's debts; and thereby, and by alledging that the testator's debts would not be paid, unless a new disposition was made of his estate, he was induced to execute the will in question. The grossness of the fraud and imposition therefore so fully appearing by the proofs, and no doubt remaining as to any fact which could make a trial necessary, it was very consistent with the rules of equity and justice, to deprive the appellant of all benefit under a will so unfairly obtained. And as to the probate of the will in the Ecclesiastical Court, it was not impeached by the decree; tho' the appellant was restrained, as in justice he ought to be, from taking any beneficial interest under it. That it was but just and reasonable, that the creditors and legatee, who were no parties to the fraud, should not be any way prejudiced or affected by it; and it would have been very unjust, that they should have been prejudiced by a decree, founded merely upon the fraudulent practices of the appellant, to which they were no ways privy. That the appellant not being the testator's heir at law, or entitled

C. Talbot.

J. Willes.

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tled as next of kin to any share of his personal estate; it was not material to him, whether the writing of the 18th of *March*, 1715, revoked any former will made by the testator, or no. But, as the appellant appeared to have been guilty of very great fraud, it was consistent with equity, that he should reimburse the plaintiff *Thomas Bransby*, the costs and expences which he had been put to in detecting such fraud. And tho' it might be inconvenient to admit parol evidence, to defeat or contradict particular devises in a will, yet it was highly proper and necessary to make use of such evidence, to shew fraud and circumvention in obtaining the will; which it would be almost impossible to prove, if parol evidence should be rejected; and therefore the admitting such evidence, was very consistent with equity and justice.

P. Yorke.

P. Jodrell.

In support of the other appeal brought by the heirs at law, it was argued, that the decree having directed the testator's personal estate to be accounted for and paid over to the plaintiff *Thomas Bransby*, contrary to the directions of the will of the 18th of *March*, 1715, which was duly proved in the Ecclesiastical Court, tended to subvert the jurisdiction of that Court in testamentary causes, and to render the probates of wills, and all the proceedings relative thereto, entirely useless and of no effect; and if any Court, after the granting such probate, should be permitted to add thereto, or to direct the account and disposition of any personal estate, contrary to what appeared therein, and in favour of any person not named therein, or in prejudice of the executor, the same would be of the utmost ill consequence. That the appellants being decreed to surrender and convey the inheritance of the estates in question to *Thomas Bransby* and his heirs, contrary to the devise of the will of the 18th of *March*, 1715, and without directing any trial at law upon the validity of that will, and in consequence thereof setting up a pretended former will; was disinheriting the appellants in favour of one, who was not even named in the last will, nor had by any trial or act in law, made out or established any title in himself, to demand such surrender and conveyance; and was therefore not agreeable either to the rules of law or equity, which always shewed heirs at law the greatest favour. That this will of the 18th of *March*, 1715, was duly executed by the testator, when he was of sound mind, memory and understanding: And as to the personal estate, it stood duly proved in the

the Spiritual Court; and was so far established, even by the decree, that the legacy thereby given was directed to be paid, and the name of *John Kerrich*, as executor thereof, was directed to be made use of in getting in any debts due to the testator's personal estate: And as to his real estate, the same was thereby declared to be subject to his debts, which was never done by any of the former wills; and therefore as this will was allowed to be in force as to these particulars, it ought to stand and be in force in every other respect; and as all former wills were thereby revoked, the will of the 30th of *January*, 1715, ought not, nor could be established or set up again, in favour of the said *Thomas Bransby*. That no parol evidence ought to have been admitted or read, to destroy the effect and operation of the devises in this will. And as the real estate was devised to *John Kerrich* and his heirs, only on a particular trust and confidence, for payment of the testator's debts and legacy within a limited time; the appellants, after such payment, were well entitled to the residue and remainder of all such real estates, and ought to have a surrender and conveyance thereof to them and their heirs; there being a resulting trust as to such residue for them, as the heirs at law of the testator.

Against this appeal it was insisted on behalf of the original appellant *Kerrich*, that the words of the will in question, were sufficient in law to devise the freehold and copyhold estates to him and his heirs, subject only to the payment of the testator's debts and legacy; and that there was no resulting trust for the benefit of the heirs at law, the estate being intended only for his benefit, subject to such payment.

And for the respondents the widow and children it was urged, that the appellant *Ann* was the mother, and the appellant *Elizabeth* the aunt of *John Kerrich*, and ought not to be benefited by his fraud, circumvention and management; and the rather, because it was proved in the cause, that the testator meant no other alteration in the disposition which he had made of his estate in favour of his father, than the payment of the debts which he should owe at his death. If therefore any legal estate passed by the will in question to *John Kerrich*, for the particular purpose of paying the testator's debts and legacy, the benefit of the surplus ought to belong to his father, to whom he had before devised his estate, and not result to his heirs at law.

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DECREE
reversed
Jour. vol. 23.
p. 209.

BUT, after hearing counsel on both these appeals, it was ORDERED and ADJUDGED, that the decree complained of, should be reversed; and that the bill exhibited by the said *Thomas Bransby* should be dismissed.

Case 54.

John Walter, Esq;

Appellant.

William Glanville, Esq;

Respondent.

15th March, 1727.

Gilb. Rep.
184.
Viner, vol. 16.
p. 371. ca. 1.
2 Eq. ca. ab.
71. ca. 14.
by the name of
Waters v.
Glanville.

WILLIAM *Elson*, Esq; being seised of the manor of *Selfea* in *Suffex*, and divers lands thereto belonging, by his will devised the same to trustees; upon trust, *inter alia*, to raise 2500*l.* for the portions of his daughters *Bridget* and *Elizabeth*, and afterwards to convey the same to his son *William Elson* and his heirs, at his age of 21. The testator afterwards died, leaving his estate very much incumbered; and in order to pay off those incumbrances, an act of Parliament was obtained for sale of the said manor of *Selfea*; and some time after, a bill was exhibited in the Court of Chancery, by the creditors of *William Elson* the father, against *William Elson* the son and others, to have the manor of *Selfea* sold for the payment of their debts.

On the 3d of *March*, 1708, a decree was made in that cause, whereby a sale was ordered to be made of the said manor of *Selfea* before the Master, and the money arising by such sale, was directed to be applied in payment of the debts of *William Elson* the father.

This decree not being proceeded upon for a considerable time, and *Bridget*, one of the daughters of *William Elson* the father, being married to *Dr. Clerke*, and her portion, as also that of her sister *Elizabeth*, being charged upon the estate; *Dr. Clerke* and his wife and *Elizabeth* exhibited their bill in Chancery, against the trustees in the will and *William Elson* the son, for payment of their portions and interest; and upon hearing the cause, an account was directed to be taken of what was due for their portions and interest; and that the same should be raised

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out of the real estate of *William Elson* the father. The Master afterwards made his report, and thereby certified to be due for Mrs. *Clerke's* portion and interest 3085*l.* 5*s.*

On the 7th of *July*, 1719, articles were entered into between *William Elson* the son and the appellant, whereby *Elson* covenanted before *Michaelmas* term then next, to convey to the appellant and his heirs, the said manor of *Selfea*; and the appellant covenanted, after the perfecting the conveyances to him, or whom he should appoint, to pay 10,000*l.* to *Elson*, or such person as should be legally entitled to receive the same.

Tho' this estate was directed by the decree to be sold before a Master to the best bidder, yet *William Elson* the son and the appellant privately entered into these articles; notwithstanding which, on the 30th of *December*, 1719, the appellant bid 10,000*l.* for the estate before the Master, on the terms of his having the rents and profits thereof from *Michaelmas*, 1719, to *Lady-day*, 1720.

On the 11th of *March* following, and before any report was made of the appellant's being the best bidder, he entered into an agreement with *Thomas Stewart*, Esq; whereby Mr. *Stewart* was to pay him 1000*l.* over and above the 10,000*l.* agreed to be paid by the appellant to *William Elson* for the estate; and the appellant was to transfer the supposed benefit of his articles to Mr. *Stewart*; but the appellant was to have the half year's rent of the estate due at *Lady-day*, 1720, which, by the fall of a life during that time, came to about 500*l.* more.

The appellant procured the Master's report of the 22d of *March*, 1719, allowing him the best bidder for the estate; and thereupon he deposited 1000*l.* with the Master, in part of his purchase money, and on the 29th of *March*, 1720, he paid the 3085*l.* 5*s.* certified by the Master to be due to Dr. *Clerke* for his wife's portion, and took an assignment thereof from them; but the 1000*l.* and 3085*l.* 5*s.* was Mr. *Stewart's* money.

The respondent having afterwards agreed with the appellant for the purchase of the premises; the respondent repaid to Mr. *Stewart* the 1000*l.* deposit and the 3085*l.* 5*s.* so paid by him in part of

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of the purchase; and also paid Mr. *Stewart* the further sum of 1000*l.* for his bargain with the appellant.

At this time *South-sea* stock was about 900*l.* per cent; and on the 22d of *August*, 1720, articles were entered into between the appellant and respondent and *Stewart*, whereby the appellant assigned to the respondent, the supposed benefit of the former articles, except the rents and profits arising from *Michaelmas* 1719, to *Lady-day* 1720, the benefit whereof was to be received by the appellant: And it was agreed, that the conveyance to be made by *William Elson* to the appellant, should be made to the respondent; and that as touching the 11,000*l.* consideration money, 10,000*l.* of it should be deemed the consideration money by the first articles agreed to be paid by the appellant to *William Elson*, and the remaining 1000*l.* was agreed to be the consideration money to be paid by the respondent to the appellant for the assignment of his articles, being the same sum the appellant was to have had of Mr. *Stewart*; and after taking notice, that the appellant had paid the 1000*l.* deposit, and the 3085*l.* 5*s.* to Dr. *Clerke*, it was agreed, that the same were the proper monies of the respondent, and to be taken as part of the 10,000*l.*; and the respondent covenanted, after the conveyance made to him, to pay 5914*l.* 15*s.* residue of the 10,000*l.* to *William Elson*, or such person as should be entitled thereto, as the Court of Chancery should direct; and that the respondent should also immediately pay the appellant the further sum of 1000*l.* residue of the 11,000*l.* and the appellant thereby assigned to the respondent the 3085*l.* 5*s.* with the assignment thereof, and also the Master's report of the 22d of *March*, 1719.

The appellant having employed Mr. *Moody* an attorney, to view the estate, and do some other business relating to the agreement; the respondent also agreed to pay him 50*l.* and gave the appellant a note promising to pay him the same after the conveyances should be perfected.

The respondent afterwards discovered, that the estate did not come up to the value given in to him, altho' he was to have paid for the same after the rate of 40 years purchase; and therefore he declined to compleat such purchase.

The appellant therefore, in *Easter* term, 1721, brought his bill against the respondent and *William Elson*, to compel the respondent to a specific performance of the said articles; and that the appellant might be discharged from his bidding before the Master, and the respondent stand in his place: To which bill answers were put in, but before the cause was heard, the appellant's agent brought in one *Page* to offer before the Master, to take a lease of the estate, as a tenant for 21 years at 400*l.* per ann. who was accordingly allowed; and, after a long prosecution, sealed a lease, but rather chose to abscond than perform it; and so the estate was thrown on the respondent's hands to his great loss; it being afterwards let for no more than 300*l.* per ann.

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In the cause, wherein the appellant was reported the best purchaser, an order was obtained on the 1st of *August*, 1722, whereby he was ordered to bring in the remainder of his purchase money, being 5914*l.* 15*s.* which the appellant accordingly paid to the Master on the 23d of *October* following.

On the 15th of *July*, 1723, the cause against the respondent came to a hearing before the Lord Chancellor *Macclesfield*; when it was, *inter alia*, decreed, that the contracts between the appellant and respondent should be performed, and that the respondent should indemnify the appellant for the future, on account of the said purchase, against *William Elson* and his trustees; and to that end, it was referred to the Master to ascertain what the contracts were, and to see the same performed, and the appellant indemnified accordingly; and that the respondent should pay the appellant the 5914*l.* 15*s.* with interest from the time it was brought before the Master. — And at this hearing, the Master's report allowing *Page* to be tenant of the estate at 400*l.* per ann. was made use of as evidence against the respondent to raise the value of the estate.

The respondent soon afterwards repaid the appellant the 5419*l.* 15*s.* with interest; and on the 26th of *August*, 1724, conveyances were executed by Mr. *Elson* and the appellant to the respondent.

There had formerly been great dealings between the appellant and respondent, as was particularly mentioned in the pleadings.

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in the appellant's cause; and the respondent had great demands against the appellant, which were not then released: There were also other disputes between them, in relation to the said purchase and decree, and other matters.

On the 6th of *August*, 1724, a meeting was had between them, and all matters, differences and demands of both parties, were considered, and their securities and papers produced, and at length they agreed to settle and adjust the same, and the respondent was to pay the appellant a great sum of money, far exceeding 1000*l.*; and both sides were to deliver up all their securities, writings, papers and vouchers, and to execute to each other general and final releases. And, pursuant to this agreement, the respondent paid the appellant the sum of money agreed on between them, in full of all demands against the respondent, and the securities, vouchers and papers on both sides, were delivered up to be cancelled; and on the same 6th of *August*, the appellant and respondent mutually executed releases to each other, whereby the appellant released to the respondent all actions, *decrees and orders of Chancery*, cause and causes of action, suits, debts, accounts and sums of money, damages and demands whatsoever, both in law and equity, or otherwise howsoever.

On the 1st of *March*, 1724, *William Elson* preferred his petition to the Lords Commissioners, praying, that the appellant might pay interest for the 10,000*l.* purchase money, from *Michaelmas* 1719, till the same was fully paid; and that *Elson* might be discharged from Dr. *Clerke's* incumbrance assigned to the appellant.

And upon hearing this petition on the 15th of the same month, it was ordered, that the appellant should procure *Elson's* other estates to be discharged from Dr. *Clerke's* demand; and it was referred to the Master to compute interest for the 10,000*l.* from *Michaelmas* 1719; and out of what should be due for interest, 500*l.* was to be paid Mr. *Kelfall*, by the consent of *Elson*, towards discharging what remained due to him for *Elizabeth* his wife's portion; and the residue of such interest was to be paid by the appellant to *Elson*.

On the 8th of *June*, 1725, the appellant preferred his petition to the Lord Chancellor *King*, praying, that such part of the order

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order of the 15th of *March*, whereby the appellant was ordered to pay interest for the purchase money, from *Michaelmas*, 1719, might be discharged; and that the interest might commence only from the time the appellant was confirmed purchaser; and that what should appear due for interest, might be paid by the respondent.

But before this petition was heard, an order was made on the 30th of *June*, 1725, that the appellant should on the 30th of *July* then next, pay all the interest directed to be paid by the order of the 15th of *March*, except the half year's interest from *Michaelmas*, 1719, to *Lady-day*, 1720; without prejudice to either side, touching that half year's interest; and accordingly the appellant on the 7th of *July*, paid to Mr. *Kelfall* 500*l.* and to *Elson* 262*l.* 9*s.* 6*d.* in full of all interest due for the purchase money, except what accrued due from *Michaelmas*, 1719, to *Lady-day*, 1720.

On the 27th of *July*, 1725, the appellant's petition came on to be heard; when it was ordered, that so much of the order of the 15th of *March*, whereby the appellant was ordered to pay interest for the purchase money from *Michaelmas*, 1719, to *Lady-day*, 1720, should be discharged; and that the appellant should pay interest from the time he was confirmed the best purchaser only: But as to the respondent's repaying the appellant what he had paid for interest as aforesaid, the respondent producing and insisting upon the said release, the petition was dismissed.

Whereupon, in *Michaelmas* term, 1725, the appellant exhibited a new bill in the Court of Chancery against the respondent; and thereby prayed, that the respondent might repay the appellant the 762*l.* 9*s.* 6*d.* with interest and costs; and also the 50*l.* agreed to be paid to *Moody*, and that the release as to the same, and the respondent's obligation to indemnify the appellant against any further demands of *Elson* and his trustees, on account of the purchase, might be set aside; and that the respondent might discharge *Elson's* other estates unfold, from any demand under colour of the assignment of Doctor *Clerke's* incumbrance.

To this bill the respondent put in a plea and answer; and as to so much of the bill as sought to compel him to repay the appellant

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appellant the 762*l.* 9*s.* 6*d.* or the 50*l.* to *Isaac Moody*, and prayed an account or satisfaction concerning any matter transacted or done, or monies pretended to be due or payable at any time before, and until the 6th of *August*, 1724, either in respect of the respondent's becoming the purchaser of the manor of *Selfea*, or otherwise relating to any affair in time before the said 6th of *August*, 1724, the respondent pleaded the matters before mentioned, previous to the appellant's giving the release; and that all accounts and demands were finally settled and adjusted between them on the said 6th of *August*, 1724, and the release given as aforesaid, which he set forth *verbatim*.—And by way of answer said, that such settling and adjusting all matters, was fairly and deliberately done; and that the appellant's release to the respondent, was upon mature and valuable considerations executed, and the monies truly paid to the appellant; and that it was mutually intended and understood to release and discharge all matters, demands and disputes between the parties; and in particular, that the said decree was mentioned and intended to be released, and for that purpose the words [*decrees and orders of the Court of Chancery*] were put into the releases before the same were executed, or the respondent would not have paid such a great sum of money, nor executed a general release to the appellant; and that the respondent believed, the appellant could not be ignorant that *Elson* intended to demand interest for the original purchase money, in regard the appellant, or his Clerk in Court, did, some time before executing the release, acquaint the respondent and his agents, that *Elson* intended to apply to the Court for such interest; and that the appellant, at the time of executing the release, did assure the respondent, he should not have any more demands made upon him by the appellant, or *Elson* or any body else, on account of the purchase.

On the 6th of *May*, 1726, this plea was argued before the Lord Chancellor *King*; who held the same to be good, and ordered it to be allowed.

T. Lutwyche.

W. Hamilton.

From this order the present appeal was brought; and on behalf of the appellant it was insisted, that the end of his bill being to set aside the release, as being obtained from him by surprise, and extending to release such matters as were in no wise under the consideration of the parties, at the time of executing

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executing it; and several matters and circumstances being charged in the bill, which, if fully answered, would have tended to shew that the release did not, nor ought to extend to cover those demands; the respondent ought to have fully supported his plea by his answer, in giving a particular and distinct answer to all the charges in the bill, relative to the matters transacted at the meeting, when the release was obtained; and that he not having done so, the plea ought to have been overruled.

On the other side it was contended, that the plea was well grounded, and the answer sufficient to corroborate it; the respondent having thereby answered the material parts of the appellant's bill, and sworn that no fraud or circumvention, or other unfair means were made use of, to gain the release from the appellant; but that the same was executed voluntarily, and upon mature and valuable consideration. That at the meeting on the 6th of *August*, 1724, all matters and differences between the parties, and their mutual demands against each other, and particularly the demand now in question, were considered, and their securities, papers, and vouchers produced, and the money agreed upon paid by the respondent to the appellant; and the securities, writings and vouchers on both sides, particularly the articles upon which the decree was founded, were mutually delivered up and cancelled. That the end of all releases is to settle and quiet disputes, and therefore had the releases in question been only general releases, they would have been sufficient to extinguish the appellant's present demands; but as there were contained in them the words, *decrees and orders in Chancery*, it appeared from thence, that both the decree and orders in Chancery were under the consideration of the parties, and were inserted on purpose to release the decree, and all demands which might arise under it; so that what was so fully and particularly expressed in the releases, must be taken to be thereby absolutely discharged. Besides, it was not pretended, that there were any other decree or orders of the Court of Chancery, to which these words could possibly relate, except such as were above stated. And as the respondent, in consideration of having such a release from the appellant, had executed a release to him of very considerable demands; he was thereby become a purchaser for a valuable consideration, of the release which the appellant, by his bill, sought to impeach. It was therefore

P. Yorke.

C. Talbot.

hoped,

Cases in Parliament.

ORDER
affirmed.
Jour. vol. 23.
p. 216.

hoped, that the order now appealed from, would be affirmed, with costs.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the order therein complained of, affirmed.

Case 55. The Mayor and Commonalty of the City
of London, Governors of the Posses-
sions, Revenues and Goods of the Appellants
Hospitals of *Christ, Bridewell, and*
St. Thomas the Apostle,
Evan Pugh and Mary his Wife, Respondents.

20th March, 1727.

THE appellants being seised in fee of several estates; for the benefit and support of the poor sick persons in *St. Thomas's* hospital, and particularly of a house at *Hackney*, called the *Bowling-Green House*, with the buildings, gardens, yards and appurtenances; and also of a bare and green used for bowling, adjoining to and usually let with the said house; they, by indenture under their common seal, dated the 17th of June, 1725, demised the premises to the respondents for a term of 21 years, from *Michaelmas*, 1724, at a rent of 30*l.* per ann.

The bowling bare contained one acre, two roods, twenty nine perches; the green, one acre, two roods, thirty two perches; the garden, two roods, five perches; and a piece of ground adjoining to the green, one acre, one rood; in all, five acres, twenty six perches.

In order to preserve the bare and green for bowling, both to keep up the value of the premises, and to accommodate many gentleman of that neighbourhood, who were either tenants or Governors of *St. Thomas's* hospital, an express covenant was inserted in the lease, that the lessees should, during the term, keep and maintain the said bowling green and bare respectively

in good order and condition, and fit for bowling; and, from time to time, as occasion should require, amend, supply and renew the turfing of the green, and maintain the buildings in or near the bare or green, for the entertainment of company; and should leave the said bare, green and buildings in good order, condition and repair at the end of the term, or other sooner determination of the lease, which should first happen.

And the respondents further covenanted, that in case any part of the demised premises should, at any time during the term, be plowed, digged, or broken up, or converted into tillage, other than and except such part as was used for gardening, which might be dug or broken up as usual, for that purpose only; or if any part of the premises should be digged or broken up, for the raising or taking away of brick-earth, sand or gravel; then the lessees should, in every or in any such case, pay to the lessors 100*l.* for every acre which should be so plowed, digged, broken up or converted into tillage; or which should be so plowed, digged or broken up, for the raising or taking away of brick-earth, sand or gravel, and so in proportion for any greater or less quantity than an acre.

The respondents entered and enjoyed the premises, and finding a great demand for gravel, for mending the roads and highways about *Hackney*; they, in the second year of their lease, thought fit to convert the bare into a gravel-pit, and by a considerable number of workmen, soon got a pit thirteen feet deep, and spread to thirty four square rods of the bare, out of which they, in a very little time, raised 2600 loads of gravel, and sold part of it at 2*s.* per load.

The appellants thereupon, in *Hilary* term, 1726, exhibited their bill in Chancery, setting forth the lease and covenants, and praying, that the respondents might be restrained from breaking up or digging the bare, or any other part of the demised premises, and from committing any waste or spoil thereon, and from removing and disposing of the gravel then dug and lying on the premises: And upon affidavit of the waste, the appellants obtained an injunction accordingly, until answer and further order.

The

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The injunction being served, the respondents put in their answer; and thereby admitted the lease and covenants to be as in the bill set forth, and also admitted, that the bare had been dug between *October* and *February*, 1726, to such depth and for such space, and that such quantity of gravel had been raised as above mentioned, and that such gravel as had been sold, was sold for 2*s.* per load: But insisted, that they ought not to be restrained from digging the bare as they should be advised, and from selling the gravel and sand arising from it; they being willing to pay 100*l.* per acre for what they should so dig, pursuant to the covenant in the lease.

Upon coming in of this answer, the respondents obtained the common order to dissolve the injunction, unless cause should be shewn to the contrary: And on the 14th of *March*, 1726, the appellants did shew cause before the Lord Chancellor King; when his Lordship was pleased to disallow such cause, and ordered that the injunction should be dissolved; the respondents consenting, if the appellants should bring an action of debt, or trover, to appear and plead, and try the same the then next term.

C. Talbot.

W. Hamilton.

But from this order the appellants appealed; insisting, that the breaking up of ground by tenants for years, by digging pits to raise any earth or mineral whatsoever, was an actual committing of waste; unless a liberty be granted by the owner of the inheritance for that purpose: And that the respondents were tenants for years, not only without any such liberty, but expressly restrained by their own positive covenant, to keep and maintain the bowling green and bare in good order and condition, and fit for bowling. As to the objection, that the appellants had given a licence, amounting to an agreement, to permit the respondents to commit this waste, by annexing a penalty, which they had agreed to accept, in consideration of the damage sustained; it was answered, that there was not in the respondents answer the least pretence or suggestion, that any such agreement was intended, or in the contemplation of any of the parties, at the time of making the lease; on the contrary, it manifestly appeared to be the intention of the appellants, to guard their estate from all waste and damage whatsoever. Besides, such an agreement would, on their part, have been highly ridiculous; for it would have been selling the estate

estate itself to the respondents at their own price; and leaving it entirely at their option, to keep a good bargain, or leave a bad one. And it now plainly appeared by the respondents answer, what the consequences would have been; since, in about four months time, and from about a sixth part of the bare, they had raised 2600 loads of gravel, and which at 2s. per load, amounted to 260l.; so that in a year or two, about 12,000 loads might be gotten from the bare only, which would produce 1200l.; and if the green and adjacent ground should also yield gravel in like manner, there might, in a few years, be raised from thence to the amount of 3000l. or 4000l. more; and the respondents, for every 100l. penalty, would have about 1000l. and, at the end of the term, leave the appellants the bottoms of the gravel-pits for their estate; which surely could not be imagined to have been any part of the agreement for the lease. And therefore it was hoped, that the order would be reversed; and the injunction continued till the hearing of the cause.

On the other side it was argued, that the 100l. per acre, P. Yorke. required to be paid for every acre of the premises which should J. Browne. be dug or broken up, was not intended as a penalty, but as a satisfaction and recompence for such part of the premises, as should be dug or broken up during the term; and therefore such digging or breaking up, ought not to be considered as committing of waste. If, however, the appellants conceived themselves aggrieved by the respondents in this respect, they might have their remedy at law against them, by action of trover or otherwise; and therefore there was no reason for a Court of Equity to interpose, by granting any injunction to restrain the respondents from digging.

BUT, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order therein complained of, should be discharged; and that the Court of Chancery should grant an injunction, till the hearing of the cause.

ORDER
discharged.
Jour. vol. 23.
P. 220.

Case 56. *Ralph Freeman and Franklyn Miller,*
Esqrs. surviving Trustees of *Joseph*
Edmonds, Esq; the Father of Dame
Ann More, Elizabeth Greenbill, Spin- } Appellants.
ster, Executrix of Mr. Edmonds, and
John Ellis, Esq; Executor of Dame
Ann, - - -
Sir Cleve More, Bart. - - - Respondent.

25th March, 1728.

Bunb. 205.
2 Eq. ab. 26.
ca. 29.

MR. *Edmonds*, by will, dated the 13th of July, 1698, devised all his manors and lands in the counties of *Lincoln, Hertford, and Leiceſter*, to the appellants *Freeman and Miller*, their heirs and assigns, and to their use during the life of Dame *Ann More*; upon trust, to pay the rents and profits of the premises during her life, to such persons as she should appoint, for her separate use; and with which the respondent should not intermeddle, nor should the same be liable to his debts: And made the appellant *Greenbill* his executrix. He also directed, that his executrix should, within six months after his decease, out of his personal estate pay to his said trustees, or the survivors of them, 6000*l.*; upon trust, to place the same out at interest, with Dame *Ann's* approbation; and pay the interest, and also the 6000*l.* for such purposes as she alone, by any writing executed in the presence of two or more witnesses, or any writing purporting to be her will, notwithstanding her coverture, should direct; so as the same should be for her own separate use, and not to be liable to the respondent's debts or disposal.

The testator having afterwards purchased other lands, of about 120*l. per ann.* in the counties of *Lincoln and Bedford*; he, by lease and release, dated the 19th and 20th of April, 1714, conveyed the same to the appellants *Freeman and Miller*, in trust for himself for life; and afterwards to pay the rents and profits to Dame *Ann*, for her separate use for her life; and then to convey the premises to such persons, and for such estates and uses, as

she, by will or writing executed in the presence of two or more witnesses, should appoint; and for want of such appointment, to her right heirs for ever.

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Mr. *Edmonds* died on the 14th of *July*, 1715; and by articles between the respondent and Dame *Ann*, dated the 11th of *August*, 1716, she, in consideration of his consent to her desire of living separate, agreed, that he should have paid to him, out of her separate effects, 1000*l.* within three calendar months then next; with 200*l.* *per ann.* parliamentary taxes deducted, for his life, payable quarterly: And it was thereby stipulated, that the agreement should be made an order of Court, and that the trustees should consent thereto; and that until such consent or order could be had, the agent for Dame *Ann* and her trustees should give security, by a bond of 1000*l.* penalty, conditioned, that either Dame *Ann* should perform the articles on her part, and that such order of Court and consent as aforesaid should be had; or that Dame *Ann* should be delivered up again into the possession of the respondent, in the Court of King's Bench, or in the Middle-Temple Hall, on six days notice. And the respondent covenanted, that on being paid the 1000*l.* and such consent and order being obtained, Dame *Ann* should live separate from him, without molestation; and that he would give security for his performance of the articles.

By an indorsement on these articles, dated the 24th of *November*, 1716, the same were affirmed; and a proposal made for exchanging the 1000*l.* for an additional annuity of 100*l.* *per ann.* to the respondent for life.

To these articles and indorsement, the appellant *Ellis* was a subscribing witness; but, designing to defeat the articles, he prevailed with Dame *Ann*, between the date of the articles and the indorsement thereon, to make a will, or writing purporting to be her will, dated the 10th of *November*, 1716, all written with his own hand; by which she made him, tho' no way related to her, sole executor and residuary legatee. And at the end of this will or writing, was the following extraordinary clause, *viz.* "That all the wills or papers pretended to be signed by her, and not having a silver penny in the seal, and lying between, or under the wax, and not signed in the presence of her trustees, executor, or Mrs. *Abigail Evelyn*, or any two of them, should be deemed forged, or by compulsion."

In

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In *Hilary* term 1717, Dame *Ann* and her trustees, exhibited a bill in the Court of Exchequer against the respondent, to avoid the articles; suggesting, that the same were obtained by *Durefs*. To which the respondent answered, and exhibited a cross bill to have the articles performed; and after witnesses were examined, both causes were heard on the 10th of *November*, 1718; when the Court being divided in opinion about the validity of the articles, as being made between husband and wife, no decree was pronounced.

On the 20th of *October*, 1720, Dame *Ann* died; and the appellant *Ellis*, on the same day, got a probate of her will.

The suit being abated by the death of Lady *More*, the respondent in *Easter* term, 1722, exhibited his bill of revivor against *Ellis* and others, to revive his former suit, and for a performance of the articles.

On the 28th of *January*, 1725, the cause was heard; when it was ordered, that a trial at law should be had between the respondent and the appellant *Ellis*, on a feigned issue; *viz.*
 “ Whether the articles between the respondent and Dame *Ann*,
 “ dated the 11th of *August*, 1716, and the indorsement
 “ thereon, dated the 24th of *November*, 1716, or either and
 “ which of them, were freely and voluntarily executed by the
 “ said Dame *Ann*.”

On trial of which issue before the Lord Chief Baron *Gilbert*, at Guildhall, on the 22d of *June*, 1726, by a special jury of *London*, which lasted nine hours; a verdict was found for the respondent, that the said articles and indorsement thereon, were both freely and voluntarily executed by Dame *Ann*.

On the 2d of *July* following, the cause was heard upon the equity reserved; when the Court unanimously declared, that the articles were well executed by Dame *Ann*, pursuant to the power vested in her by the will of her father Mr. *Edmonds*; and therefore decreed, that the same should be performed, and carried into execution as far as they remained unperformed by Dame *Ann* and her trustees; and that 735*l.* remainder of the 1000*l.* by the articles agreed to be paid in three months, should be paid to the respondent, or whom he should appoint, with interest from the time that the said 1000*l.* should have been

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been paid: And that the arrears of the 200*l. per ann.* should be also paid him, or to whom he should appoint; and that the respondent should have settled on him the said annuity of 200*l. per ann.* to be paid him quarterly for his life, out of the separate trust estates of Dame *Ann*, subjected thereto by the articles; and that he should have his costs at law and in equity taxed, and paid out of the said trust estate. And it was referred to the Deputy Remembrancer to tax the same, and take an account of what was due to the respondent for principal and interest of the 735*l.* and the arrears of the 200*l. per ann.* And it was also decreed, that all the trust estates of the said Dame *Ann*, should stand as a security for the same: And the Deputy was to take an account of the said estates and effects, and of what securities the same did consist at the death of Dame *Ann*; and certify to the Court, what parts of the trust estates were subjected and made liable to the performance of the articles.

From both these decrees the present appeal was brought; and on behalf of the appellants it was insisted, that the Court should not have established, or given any directions towards the execution of the articles, but the bill ought to have been dismissed; for that it fully appeared by the proofs in the cause, that Lady *More* was seized by force, and continued under that custody and power, till the time of executing the articles; and that there was no consideration for the same, but only to be delivered from that confinement; she having in fact lived separate from her husband for several years before. That these articles were not performed by the respondent, who was to give security that she should live separate from him without molestation, yet no such security was ever given or offered, neither did the trustees consent, nor was any order of Court obtained, both which circumstances were part of the terms of the articles. That no trial at law ought to have been directed, but the Court should have determined the question upon the proofs, without a trial; the facts on which the appellants relief was grounded, being only proper for the consideration of a Court of Equity. That Dame *Ann* had by her will, made a full and compleat appointment of all her trust estates, pursuant to the power given her by her father, to her grandchildren and creditors, without taking any notice of the articles; and if those articles were now to be carried into execution, the several annuitants,

T. Lutwyche.
N. Fazakerley.

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creditors and legatees, would be in a great measure prejudiced, tho' they were no parties to the suit.

C. Talbot.
W. Bunbury.

To this it was answered on the other side, that married women who had separate estates, were considered in equity as single women with regard to such estates, and had an absolute power of disposing of them in favour of their husbands, or any other person, notwithstanding their coverture; and therefore in the present case, the respondent's late wife having by the articles, made an appointment in his favour, her coverture, or his relation to her at the time of making that appointment, were no objection to it. That the fraud and imposition complained of, being founded upon a supposition, that the articles were obtained from her by *Duress*, and were not freely and voluntarily executed, that fact was properly triable at law; and it having been tried, and a verdict found for the respondent upon full evidence, there was no ground to alledge that the articles were obtained by any fraud or imposition. That the will of Dame *Ann* could not controul the articles under which the respondent, being a creditor, brought his bill of revivor properly against her executor, and the trustees of her separate estate; and it was neither necessary, nor would it have been proper for him to have made her legatees parties to this bill: For if, in consequence of the decree, there should not be assets left to pay the legatees their full legacies, the appellants could not be liable to pay them more than the remaining assets should amount to. And lastly, that Mr. *Edmonds's* supposed intention to exclude the respondent, could operate no further than to exclude him from taking any thing by virtue of his will or settlement only; but there was nothing in either of them, which disabled Dame *Ann* from making any appointment in the respondent's favour, that she thought fit to make, and which she had accordingly done by the articles. It was therefore hoped, that the decrees would be affirmed, and the appeal dismissed with costs.

DECREES
affirmed.
Jour. vol. 23.
p. 225.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decrees therein complained of, affirmed: And it was further ORDERED, that the appellants should pay to the respondent 40/. for his costs in respect of the said appeal.

Robert

Robert Staines, - - - Appellant. Case 57.

Edward, Robert, Thomas, John, William
and *Sarah Maddock*, Infants, - } Respondents.

30th April, 1728.

THOMAS Lord being possessed of a considerable personal estate, to the amount of 3000*l.* duly made his will, dated the 23d of November, 1720; and thereby gave to his brother *William Lord*, 10*l.* per ann. for life, to be paid by his executrix by four equal payments; and gave to his niece *Alicia Staines*, the wife of the appellant, all the estate which he should die possessed of, or any way interested in, either in possession, reversion, or remainder; but declared his mind and will to be, that the interest, or other produce thereof, should be for the sole use and benefit of his said niece *Alicia*, separate and apart from the appellant her husband, or any other husband; and that her receipt, notwithstanding her coverture, should be a sufficient discharge for any sums of money to her paid: And after the decease of his said niece *Alicia*, he gave and bequeathed all his said estate unto his executrix; in trust, that she should pay the yearly interest and produce thereof, for the maintenance and education of such child or children, as should be lawfully begotten by the appellant on the body of the said *Alicia Staines*, until they should attain their respective ages following, viz. if sons, the age of 21, and if daughters, 18; and when they should attain such respective ages, that then his executrix should pay them their several proportions thereof, share and share alike; and for want of such issue, he gave and bequeathed all his estate unto the respondents, the children of *Sarah Maddock*, wife of *Edmund Maddock*, lawfully begotten by the said *Edmund* on the body of the said *Sarah*, share and share alike; and directed his executrix within one year after his decease, to pay to *William Elliot* and *Joseph Hayes* 5*l.* to be by them distributed to the poor of the congregation belonging to the dissenting protestant meeting in *Hanover Square*, whereof the Reverend Mr. *Jabez Earl* was then pastor; and constituted the said *Alicia Staines* residuary legatee and sole executrix.

2 Wms. 421.
Viner, vol. 8.
p. 448, note to
ca. 8,
2 Eq. ab. 341.
ca. 15.
Ferne 320.

Cases in Parliament.

On the 16th of September, 1723, the testator died; and on the 20th of the same month, the said *Alicia Staines* proved his will in the Prerogative Court, and she and the appellant her husband possessed themselves of the testator's personal estate, and the deeds, writings and securities relating thereto.

In *Michaelmas* term, 1723, the respondents being the only children of *Sarah Maddock* by *Edmund Maddock*, and being all infants, exhibited their bill in Chancery against the appellant and *Alicia* his wife, setting forth the will of the testator; and that the said *Alicia* had no children, nor was in likelihood of having any; and therefore prayed a discovery and account of the testator's personal estate, and that the same might be secured for the respondents benefit.

To this bill the appellant and his wife put in their answer, admitting the facts of the bill, and setting out a particular account of the testator's personal estate; but submitted to the judgment of the Court, whether such personal estate ought to be subject to the contingency in the testator's will.

On the 5th of May, 1724, the cause was heard before the Master of the Rolls; when his Honour did not think fit to direct any account to be taken of the testator's personal estate, but ordered, that the appellant and his wife should not transfer the testator's stocks, or assign his leases, or receive in any of his debts, without application to the Court for leave so to do; and thereupon such further order should be made as should be just.

On the 11th of January, 1726, *Alicia* the appellant's wife died without issue, whereby the suit and proceedings abated; and therefore in *Hilary* term following, the respondents exhibited their bill of revivor and supplemental bill against the appellant; charging, that the whole personal estate of the testator *Thomas Lord*, after payment of his debts, legacies and funeral expences, ought to have come to the respondents, and that they were well entitled thereto under the testator's will, upon the death of *Alicia Staines*, without issue of her body by the appellant, as the same was given them by the will upon that contingency, share and share alike: But that the appellant set up a title thereto, under some will pretended to be made by his wife, tho' she had no power to dispose of the *residuum* of such personal

personal estate to any person after her death; and therefore prayed, that the appellant might shew cause, why the original suit should not stand revived, and why he should not account for the *residuum* of the testator's personal estate, and pay and deliver over the same to the respondents, and release all pretence of title thereto.

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The appellant put in his answer to this bill, and thereby stated, that *Alicia* his wife had, before her death, by his permission, made her will, dated the 9th of *October*, 1724, and after reciting the will of the testator *Thomas Lord*, and taking notice, that the estate he died possessed of was altogether personal, and, as she apprehended, vested in her by the said will; but that the respondents, in case she should die without issue, pretended a right thereto; she devised to *Thomas Parsons* 490*l.* *South-sea* stock, and 490*l.* *South-sea* annuities, then standing in the testator's name, in trust, to permit the appellant to receive the dividends and interest thereof, for his life; and after his death, in trust for the equal benefit of the respondents; and she thereby gave the respondents an annuity of 24*l.* issuing out of several messuages in *Spital-fields*, for the remainder of the term that should be to come therein at her decease, equally between them; and constituted and appointed the appellant sole executor and residuary legatee of her said will; and therefore he submitted to the Court, whether the respondents, under the will of *Thomas Lord*, were entitled to his personal estate upon the death of his the appellant's wife without issue; or, whether she had not a power to dispose thereof by her will; and how far he should be accountable to the respondents for the personal estate of the testator come to his wife's hands, she having managed and disposed thereof without his controul.

The cause being duly revived, came again to be heard before his Honour the Master of the Rolls, on the 17th of *May*, 1727; who decreed the appellant to come to an account before the Master, for the testator *Thomas Lord's* personal estate come to his hands, or to the hands of *Alicia* his late wife, or any other person for their use; and to produce, upon oath, all books of account and papers relating thereto, and to be examined on interrogatories, as the Master should direct; in taking of which account, the Master was to make the appellant all just allowances.

1728.

ances: And the Master was to examine, whether any of the securities for any part of the testator's personal estate, were fit to be put in suit, and if so, then the Master was to direct the same accordingly; and what of the testator's personal estate should upon the said account appear to be in the appellant's hands, after all just allowances deducted, it was decreed, that the appellant should pay and deliver over the securities for the same into the *Bank of England*, to be placed to the account of the Accountant General, and to be put out at interest for the benefit of the respondents the infants, until their ages of 21, and then to be paid, transferred, or assigned to them respectively; and the Master was to examine what was fit to be allowed for the maintenance of the respondents the infants, for the time past and to come, and to state the same to the Court; and the consideration of costs was reserved till after the report made; and it was ordered, that the appellant should not in the mean time alien any part of the testator's estate.

From this decree, the appellant preferred his petition of appeal to the Lord Chancellor *King*; and the cause coming to be reheard before his Lordship, on the 28th of *October*, 1727, his Lordship dismissed the petition, and ordered, that the decree should be confirmed.

P. Yorke.

H. Hinch-

man.

The appellant therefore brought the present appeal, and on his behalf it was argued, that by the testator's will, his estate subject to the payment of his debts and legacies, was given to *Alicia*, the appellant's late wife, not for her life only, but absolutely; that the subsequent restriction was merely for her benefit, in order to appropriate the interest for her separate use, and exclude her husband from intermeddling with such interest; and that this estate consisting wholly in personal chattels, the remainder over limited to the children of *Sarah Maddock*, could not be effectual. That this being the case of a legacy, the same might have been sued for in the Ecclesiastical Court; and by the rules of the civil law, such a legacy would have vested absolutely in the first legatee, and the bequest over would have been void: And though by the law of *England*, Courts of Equity exercise a concurrent jurisdiction with the Ecclesiastical Courts, in suits for legacies, yet the rule of determination ought to be the same. That to allow the bequest over of chattels personal to the respondents by virtue of this will, to be good; was going further than had hitherto been

been admitted in cases of the like kind. The contingency on which this limitation over was to take place, was for want of issue of *Alicia Staines*; which, if it had been made with respect to a freehold estate, would have comprehended all issue of her body by the appellant, even to grandchildren, great grandchildren, &c. And in cases of limitations of estates, the same words ought to receive the same construction, otherwise great uncertainty and confusion would be introduced: But the failure of issue of any person generally, was too remote a contingency for the devise over of a personal thing to depend upon. Besides, this case must be considered according to the words of the limitation, and not according to any accident which had happened subsequent to it; and therefore it was apprehended, that if *Alicia* had left children by her husband, and such children had afterwards died without issue, this devise over could not have taken effect. That by the decree, the appellant was directed to account for what had been received by his wife in her life-time; altho' the interest and produce of the testator's whole estate was given to her sole use, separate and apart from the appellant, and her receipt was to be sufficient for all such parts thereof as she should receive; and therefore *Thomas Parsons*, the trustee named in her will, ought to have been made a party to the suit. It was therefore hoped, that the decree would be reversed, and the respondent's bill dismissed with costs.

On the other side it was said to be a known and settled point in equity, that a personal estate may be settled or bequeathed to one for life, with remainder over to another; and it was manifestly so bequeathed in this case, for by the words of the will, the testator's personal estate was not vested in *Alicia Staines*, she being only entitled to the interest and produce of it for her life; and therefore the limitation over to the respondents, on her death, she having no children, was a good limitation. That tho' the words of the will, whereby the testator left his estate, after the death of *Alicia*, to his executrix, who was *Alicia* herself, seemed not to have been well considered; yet there were words sufficient to shew the testator's intention, that she should have only the yearly produce and interest during her life, and that afterwards the appellant's children by her, if there should be any, were to have the estate; and if there were no such children, that then the respondents, the children of *Sarah Maddock* should have it; and therefore *Alicia* being

T. Lutwyche.

W. Strahan.

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being entitled only to the interest and produce of this estate for her life, had no power to dispose thereof by will, or otherwise, after her death. That the last clause in the will, appointing *Alicia* executrix and residuary legatee, did in no sort revoke or vary the former clauses, nor were they any way inconsistent with each other; the executrix being only a trustee for the benefit of the legatees, and to take such residue only as was lapsed, or undisposed of. That tho' the clause which deviled the estate after the death of *Alicia* to his executrix, who was herself, seemed inconsistent, yet the limitation over by the subsequent clause, for want of children of *Alicia*, would be good; she by the first clauses being only entitled to the interest and produce for her life, and after her death, the estate was to go according to the plain intention and words of the testator.

DECREE
affirmed,
with a varia-
tion.
Jour. vol. 23,
p. 250.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree and the affirmance thereof, should be affirmed, with a variation as to the appellant's accounting; which variation was to be by leaving out of the decree these words; viz. ["is come to his hands, or to the hands of his late wife "*Alicia Staines* deceased, or to the hands of any other person, for his, their, or either of their use; for the better discovery whereof,"] and instead thereof inserting these words, ["came at any time to his hands, or to the hands of any other person for his use; and also, for what of the testator's estate came to, or was in the hands of his late wife *Alicia Staines*, or to the hands of any other person for her use, since the 5th of May, 1724, or at any time thereafter, and that an account be likewise taken of what of the said testator's personal estate came to the hands of the said *Alicia*, after the death of the said testator, to the said 5th of May, 1724, which was not paid or delivered over by her to her husband; and that what shall be found so due from her, shall be paid by the defendant her executor out of assets, and be applied in the same manner as is in the said decree after directed concerning the said testator's personal estate that shall appear to be in the said defendant's hands; and if he doth not admit assets, then an account is to be taken of assets come to his hands; and as far as it shall appear that he hath assets, he is to satisfy the said demand in a course of administration; and for the better discovery and taking the said accounts."] Which decree, as thus varied, was declared to be the judgment of the House, and to be observed and put in execution accordingly.

John

John Bettefworth, Doctor of Laws and Dean of the Arches, President of the Society of Doctors and Advocates in Commons; *Sir Henry Penrice*, Knt. and Judge of the High Court of Admiralty, *Humphrey Henckman*, Doctor of Laws, Chancellor of the Diocese of London, *George Paul*, Doctor of Laws, Vicar-General of the Archbishop of Canterbury and Treasurer of the Society of Doctors in Commons, on behalf of themselves and the rest of the Doctors of Laws and Advocates in Commons, or of that Society called *Doctors Commons*,

Cafe 58.

Appellants.

The Dean and Chapter of the Cathedral Church of *St. Paul*, London, and the Master, Fellows and Scholars of *Trinity Hall* in Cambridge,

Respondents.

13th May, 1728.

THE Dean and Chapter of *St. Paul*, London, being seized in fee of *Montjoy* house, on the scite of which Doctors Commons has been since erected, made a lease thereof, by indenture dated the 8th of *April*, 1555, to *Sir Thomas Pope*, Knt. for fifty years, to commence from *Michaelmas*, 1567, at the rent of 5*l.* per ann. This term afterwards vested in the Master, Fellows and Scholars of *Trinity Hall*; and there being an antient society of Doctors and Professors in the civil and canon laws, but not incorporated, who had associated themselves in Commons for the practice of those laws; and the Master, Fellows and Scholars of the said college, being many of them of the Doctors Society, and by their foundation of the same faculty; and the Society of Doctors being removed from *Pater-*

Select Cases
in Chancery,
66.
Grounds and
Rudiments of
Law and
Equity 254.
2 Eq. ca. ab.
26. ca. 30.

1728.

noſter-row, where they formerly had been, into *Montjay* houſe, and intending to fix the ſociety there; it was agreed, that a further leaſe ſhould be made of the ſaid houſe and premiſſes.

Accordingly, on the 2d of *February*, 1567, the Dean and Chapter of *St. Paul*, as well in conſideration of the great ruin and decay of the ſaid houſe and premiſſes, and of the great charges to be expended by the Maſter, Fellows and Scholars, and their ſucceſſors, in new building divers apartments therein, as alſo for that the Advocates and Doctors of the *Arches* in *London*, and others of that Society, learned men or Graduates of the univerſities ſhould inhabit therein, and for other conſiderations, did leaſe the ſaid houſe and premiſſes to the ſaid Maſter, Fellows and Scholars of *Trinity Hall* for 99 years, at 5*l.* 8*s.* per ann. to commence from the end of *Sir Thomas Pope's* leaſe; with an expreſs covenant from the ſaid Maſter, Fellows and Scholars, with the Dean and Chapter and their ſucceſſors, that the ſaid meſſuage and gardens ſhould be occupied by the ſaid Advocates and Doctors; and the Maſter of *Trinity Hall*, for the time being, was to have an apartment therein.

And the Dean and Chapter thereby covenanted, that if the Maſter, Fellows and Scholars of *Trinity Hall*, their ſucceſſors or aſſigns, ſhould, at any time during the ſaid term of 99 years, offer to ſurrender the ſaid leaſe; that then, upon reaſonable requeſt, the Dean and Chapter, or their ſucceſſors, ſhould make to the ſaid Maſter, Fellows and Scholars, or their ſucceſſors, another new leaſe of the premiſſes, for the fine of 20*l.* for the number of ſo many years, and with all and ſingular the ſame covenants and conditions contained in this leaſe. And the Maſter, Fellows and Scholars covenanted with the Dean and Chapter and their ſucceſſors, that the Maſter, Fellows and Scholars ſhould pay 8*s.* per ann, to the Dean and Chapter during the term in *Sir Thomas Pope's* leaſe; and that the Maſter, Fellows and Scholars, or their ſucceſſors, ſhould not at any time thereafter aſſign or alienate the leaſe to any other than to the whole company of Advocates and Doctors of the *Arches* and others of their ſociety, to be uſed as aforeſaid, and not otherwiſe, without the expreſs conſent of the Dean and Chapter, or their ſucceſſors, firſt had in writing. And that whenſoever thereafter, as well during the ſaid term of 50, as the term of 99 years, the Dean and Chapter, or their ſucceſſors, ſhould happen to have need of any council

or advice in any cause or question concerning the ecclesiastical laws of this realm, that then the Advocates or Doctors of the Arches, on reasonable request from time to time by the Dean and Chapter and their successors, should freely give their best advice and council to them, in every such matter or question.

In the 13th of *Eliz.* an act of Parliament was made, whereby after reciting, that long and unreasonable leases made by Colleges, Deans and Chapters, Parsons, Vicars, and others having spiritual promotions, were the chiefest causes of the dilapidations and decay of all spiritual livings and hospitality, and the utter impoverishing of all successors, incumbents of the same; it was enacted, that from thenceforth, all leases, gifts, grants, feoffments, conveyances or estates, to be made, had, done or suffered, by any Master and Fellows of any college, Dean and Chapter of any cathedral or collegiate church, &c. of any houses, lands, or other hereditaments, being any parcel of the possessions of any such college, cathedral church, &c. to any person or persons, bodies politic or corporate, (other than for the term of 21 years, or three lives, from the time any such lease or grant should be made or granted, whereupon the accustomed yearly rent, or more, should be reserved and made payable yearly, during the said term) should be utterly void and of none effect, to all intents, constructions and purposes, any law, custom or usage to the contrary notwithstanding.—Then follows a proviso in these words, *viz.* “That this act shall not extend to
“any lease hereafter to be made, upon surrender of any lease
“heretofore made, or by reason of any covenant or condition
“contained in any lease heretofore made, and now continuing;
“*so that the lease to be made do not contain more years, than the*
“*residue of the years of the former lease now continuing shall be,*
“*at the time of such lease hereafter to be made, nor any less rent*
“*than is reserved in the said former lease.*”

Another act was made in the 14th of *Eliz.* whereby it was enacted, that the former act, or any thing therein contained, should not extend to any grant or lease of any houses belonging to any persons, or bodies politic or corporate, situate in any city, borough, town corporate or market town, or the suburbs of any of them, or to any grounds thereto belonging; but that all such houses and grounds might be granted and demised, as by the laws of this realm, and the several statutes of the

13. Eliz. ch. 10.

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the colleges, cathedral churches and hospitals, they might have been before the making of the said statute: Provided, that no lease should be made by force of this act in reversion, nor without reserving the accustomed yearly rent at the least, nor without charging the lessee with the reparation, nor for any longer term than 40 years at the most.

In May, 1656, a bill in Chancery was exhibited by the Doctors in Commons against the Master, Fellows and Scholars of *Trinity Hall*, and others, for establishing and settling the trust of the said lease for 99 years, dated the 2d of February, 1567, and to be quieted in possession; the college pretending, that the same was not taken in trust for the Society of Doctors, but in their own right.

This cause being at issue, was several times heard; and at last, by two several orders, dated the 13th of July, 1663, and the 17th of May, 1664, the matters were referred to Mr. Serjeant *Glynn* and Sir *Jeffery Palmer*.

Pursuant to these orders, the referees on the 14th of January, 1664, made their certificate; and thereby, *inter alia*, appointed, that those Doctors who had leases of chambers from the college, might, on demand, renew the same, under the same rents then paid, for 21 years, without fine; and that those who had no leases, and were in possession, with the consent of the Doctors Society, might take leases without fine for 21 years; and that when the lease from the Dean and Chapter came to be renewed, and a fine thereof paid, the same should be renewed at the charge of the college, with the same qualified trust, under the same covenants and agreements as contained in the said lease of February, 1567, and subject to the performance of the several particulars therein agreed; and that on the grant of any lease by the college, to any new comer in, a fine should be paid to the college, not exceeding one year's rent; and therefore, when the lease of the Dean and Chapter should be renewed, no greater rents should be reserved on the chambers than were then payable, nor greater fines than as aforesaid; and that the Doctors who outlived any lease for 21 years, might renew without fine.--And by several orders of the Court, this certificate was absolutely confirmed.

In September, 1666, the fire of *London* happened, and the said house called *Doctors Commons* was burnt; whereupon, by an order of the King in Council, dated the 5th of *October* following, the Doctors removed to *Exeter* house, to keep their Courts there.

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By an act of Parliament, 19 *Car. II.* intituled, *An act for erecting a Judicature, for determination of differences touching houses burnt or demolished by reason of the late fire*; the said Court of Judicature was impowered, where they should think it convenient, to order new leases, not exceeding 40 years, to be made of any of the premises.—And by an additional act, 22 *Car. II.* it was enacted, That the said term of 40 years should not be added to any term of years in being, so as to make the whole term exceed the number of 60 years, by any decree to be made by virtue of this, or the former act.

In 1670, *Trinity Hall* petitioned the Judges of this Court of Judicature, which sat at *Clifford's Inn*, complaining, that the Doctors refused to build, or surrender up their leases; and praying, that the Dean and Chapter and the Doctors might contribute towards the building.—And the Dean and Chapter also petitioned the same Court, taking notice of the said lease for 99 years, and that there were about 46 years to come therein; that the promotion of trade and dealing about *Doctors Commons*, chiefly depended on that Society, and the persons resorting to them and their Courts, and that the building was neglected; and therefore prayed, that the College and Society of Doctors might appear, and that directions might be given for the furtherance of the building.

On the 1st of *December*, 1670, these petitions were heard; and it was thereupon decreed, that the term then to come in the lease of the 2d of *February*, 1567, should be made up to 60 years; and that the Dean and Chapter, on surrender of that lease, should make to *Trinity Hall* a new one for 60 years, from *Michaelmas*, 1670, under the yearly rent of 5*l.* 8*s.* but without any fine; and that after the expiration of the 60 years, the covenants in the lease then in being might be resumed.

In obedience to this decree, the Dean and Chapter, on the 20th of *February*, 1670, made a new lease to *Trinity Hall* for

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60 years from *Michaelmas*, 1670; but no covenant for granting a further term of 99 years was inserted therein, nor were there any directions in the decree for that purpose.

Nevertheless, in *Hilary* term, 1725, the appellants exhibited a bill in Chancery against the respondents; praying, that they might be compelled to make a lease to *Trinity Hall*, upon the terms and conditions mentioned in the lease of the 2d of *February*, 1567, and for such number of years as was thereby granted; or if the same should not be legal, then for the term of 40 years, and so from time to time for such term as by law they might grant, till it should be made a term or terms for 99 years, on payment of a fine of 20*l.*; and that at the end of such new term of 99 years, the lease might, in like manner, be renewed from time to time for ever.

The respondents, by their answer to this bill, submitted to the judgment of the Court, whether they were compellable to make any such lease or leases, or not; and averred they did not know or believe, that they or their predecessors had ever had the advice of the Doctors freely; but if at any time it had been taken, the same acknowledgments had been expected and made, as were usually made by other persons, in the like cases.

The cause was first heard on the 4th of *August*, 1726, before the Lord Chancellor *King*; when his Lordship was pleased to declare, that he would hear it argued again, and would then be assisted by some of the Judges.

Accordingly, on the 16th of *November* following, the cause was again heard before the Lord Chancellor, assisted by the Lord Chief Justice *Raymond*, the Master of the Rolls, and Mr. Justice *Price*; and having taken time to consider till the 13th of *March*, they then delivered their opinions *seriatim*; when, upon the concurrent opinion of the Lord Chancellor, the Lord Chief Justice, and Mr. Justice *Price*, (the Master of the Rolls dissenting) the Court declared, that the appellants were not entitled to any relief, either in law or equity, and therefore dismissed the bill.

C. Talbot.

T Lutwyche.

From this decree the appellants appealed; and on their behalf it was contended, that by the covenants in the lease of *February*, 1567, for the Dean and Chapter and their successors

on request, to grant a new lease for 99 years to the Master, Fellows and Scholars, and their successors, for a certain fine of 20*l.* and for them not to assign or alienate the lease to any other than the whole company of Advocates and Doctors of the Arches and their society, without the express consent of the Dean and Chapter, and their successors, in writing; it was plain, that a fixed and permanent place was intended by all the parties, to be provided for the appellants to reside in and keep their Courts; and that the continuance thereof, was not to depend singly upon the pleasure of the Dean and Chapter. That these covenants, at the time of executing the lease, were certainly binding both in law and equity; and being made upon the most valuable considerations, namely, the great decay and ruin of the premises, and the great charges of rebuilding the same; and as the appellants were obliged by covenant to settle there, which would be of great advantage to the Dean and Chapter, who were owners of a large estate in houses in that neighbourhood; the appellants were thereby, and by the fine and rent to be paid, by the advice to be given by them to the Dean and Chapter when required, and by the great sums of money laid out in rebuilding and other improvements, become purchasers of the benefit of the covenant for renewal. That covenants and agreements entered into for a valuable consideration, were considered in equity as performed; and tho' no legal estate passes by them, before they are carried into execution by proper conveyances, yet the equitable interest of the covenantors is bound from the time of their entering into such covenants, and they are from thence in the nature of trustees for the covenantees.

It was objected, that by the first of the disabling statutes, the Dean and Chapter could not make any lease for more than 21 years, or three lives; and by the other, they were restrained from making leases for any longer term than 40 years, and that only of houses or grounds situate in a city, borough or market town: That the covenant in question, being to grant a term of 99 years, which by these statutes was prohibited, it was therefore void; and that they could not, nor ought to grant a term even for 40 years, for that the covenant must be taken entire, and no breach of this covenant at law could be assigned, for not making a lease for any less term than 99 years; and if the whole was not, then no part of it ought to be granted.

But

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But in answer to these objections, it was said to be a harsh way of reasoning, that because a person was now supposed to be prohibited from doing the whole of what he had agreed to do, he therefore should not do what was in his power, and was lawful for him to perform; or to say, that because part of a thing was taken away, the whole must be so too, tho' part was still reserved; and in truth, such construction and reasoning were apprehended to be inconsistent with the rules of equity. That this covenant for renewal was all along taken to be a good and subsisting covenant, even after the statutes were made; and so it appeared, as well from the certificate of Mr. Serjeant Glynn and Sir Jeffery Palmer in 1664, which was absolutely confirmed by the Court of Chancery, as from the decree of the Court of Judicature at *Clifford's Inn*; wherein it was said, that after the 60 years term was expired, the covenants in the lease then in being might be resumed. That as the appellants and their trustees, the college, had performed their part of the agreement, by rebuilding and returning to reside in their several apartments; it was reasonable that the Dean and Chapter should be compelled to make such a lease as the statutes did not prohibit, viz. for 40 years; and so *toties quoties*, till the term covenanted for was made up. Lastly, that the lease desired was not within any of the causes assigned in the preamble of the statute for preventing long and unreasonable leases, which were said to be the chief causes of dilapidations and decay of hospitality, and utter impoverishing of all successors; for this lease was made on good considerations, and therefore not unreasonable; nor could it be any cause of dilapidations with regard to the premisses demised, building being one consideration thereof, and there being sufficient provision made for keeping the buildings in repair; neither could it be any impoverishment of the successors, there being more rent made payable than had been before reserved; and considering the value of money when the lease of 1567 was made, the sum of 372*l.* which had been since laid out in repairs, was apprehended to be more than the reversion or inheritance of the whole estate, expectant upon the determination of Sir Thomas Pope's lease, was worth.

P. Yorke.

E. Edlin.

On the other side it was argued, that the Court of Judicature which sat at *Clifford's Inn* in 1670, had no jurisdiction but to settle differences arising by means of the fire of *London*; and consequently were not authorised to determine, that the Dean and Chapter

Chapter were bound by the covenants in the lease of February, 1567: Neither did that Court take upon them to make any such determination; the words in the conclusion of their decree, *That at the end of the 60 years lease, the covenants in the lease then in being may be resumed*, amounting only to a declaration, that the lease by that decree directed to be made, should be without prejudice to any claim or question, which might possibly arise upon those covenants. So that the single question was apprehended to be, Whether the respondents were obliged by virtue of the covenant contained in the old lease of 1567, to grant such a lease as was prayed by the Doctors, viz. for 99 years, or from 20 years to 40 years, till it should be made a term of 99 years, or a fine of 20*l.* and under a reserved rent of 5*l.* 8*s.* Or, Whether they were not disabled, and consequently discharged, by the restraining statutes, from complying with any such obligation?

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That they were so discharged, appeared from the statutes themselves; by the first of which, all leases to be made for above 21 years, or three lives, or of houses in corporations for above 20 years, were void. There follows indeed a clause in the 3 Eliz. by the first part of which it is provided, *that this act shall not extend to any lease hereafter to be made upon the surrender of any lease heretofore made, or by reason of any covenant or condition contained in any lease heretofore made*; and if the proviso had stopped here, it must be confessed, that a new lease to be made upon the surrender of a former, or in pursuance of a covenant contained in a former lease, would have been good, how long soever the term had been: But then the clause goes on in these words, *so that the lease to be made do not contain more years, than the residue of the years of the former lease shall be, at the time of the lease hereafter to be made*. And therefore no lease exceeding the residue of the former can be good, because the whole clause taken together, makes good nothing but such new leases made on the surrender of old ones, or in pursuance of covenants or conditions contained in old ones, as do not exceed the number of years remaining of the former.

But it may be objected, that this is a superfluous clause, adventently thrown into the statute, and therefore no stress is to be laid upon it: For to what purpose should they give leave to make new leases on the surrender of old ones, or in pur-

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fuance of covenants contained in old ones, for the remainder of the term of the old ones, and no longer? And why might not the tenants as well keep their old leases?

To this it may be answered, that the Legislature considered, that many of the old leases which had been made for a valuable consideration, might be defective; that if the lessees had occasion to sell them, the purchasers might be desirous, or obliged by clauses in the old leases, to take new ones in their own names, or for other reasons it might be proper to renew them before they were expired: In which cases, the lessors, however willing, could not have granted new leases to continue for the remainder of the old ones, upon a surrender of them; nor have been compelled to do it, if unwilling, by virtue of any covenant or condition for that purpose contained in the old one, if they exceeded the term limited by this act; but the new lease would have been void by the enacting part of the statute. The Legislature therefore had such regard to leases, which were actually executed before the making of this act, that they not only took care to prevent such leases from being affected by the enacting part; but added this clause on purpose to make good such leases, as the parties interested should be desirous of making, in the room of such parts of the old term as should be then unexpired. But as to leases to be made, exceeding the remainder of the old ones, tho' in pursuance of covenants therein contained; they thought fit, for the public good, to make all such leases void, and so discharge the covenants for granting them. Neither is this clause inadvertently drawn; for whoever considers it, will see it is penned with great care, to prevent the inconveniencies of such leases, as are contended for by the present appellants. In the latter of these statutes, there is no proviso to save any such lease at all: But as all the statutes relating to ecclesiastical leases, are to be construed and explained by one another, and as this statute of the 14th was but an appendix to that of the 13th *Eliz.* the omission of this proviso might not, perhaps, be thought of any weight either way. However, if the latter statute should be considered as independent of the former, yet it would be a strange inference, that because the makers of it had saved no sort of leases out of the enacting part, they therefore intended to save all. But the contrary inference seems rational enough, that they now omitted that clause, which the year before they had inserted in the former

former act, that then lay before them to be altered and enlarged; because they intended to save none so far, as to suffer any lease to be made for more than 40 years, the term allowed by the latter act, that being itself a long term. So that whether the statutes were to be considered singly, or together, it would be a vain thing to grant a lease for 99 years, which would be ineffectual when made.—And as to leases for 40 years to 40 years, till it should be made up 99 years, it was conceived a Court of Equity would never decree so plain an evasion of any law; for that would be the same thing in effect, as a single lease for 99 years, and would as effectually defeat the remedy intended by these statutes. And should the respondents be ordered to make such leases, this would be a declaration that they might be made consistently with law; a declaration of the highest ill consequence, as it would be an intimation to all the churches and colleges in *England*, to evade the statutes and defeat the remedy designed by them, in the same way. But further, should the respondents be directed to make a lease for 40 years, with a covenant to grant another at the expiration of it for the same term; such a covenant would be void by the statute of the 18 *Eliz.* which enacts, “That all leases to be made of ecclesiastical possessions, whereof any former lease is in being, not to be ended within three years, shall be void; and that all covenants for making such leases, shall be also void.”

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The respondents however, were willing to treat with the Doctors for a single lease of 40 years, without any covenant of renewal to be inserted in it; but it was apprehended, that they were no way obliged to grant even such a lease, upon the foot of the covenant in the old lease of 1567. For that being a covenant to make a lease of 99 years, for a fine of 20*l.* and under a reserved rent of 5*l.* 8*s.* with a clause in it for renewal; and it having become impossible by means of these statutes, to make a lease either for so long a term, or with a clause of renewal; it was apprehended, that the respondents were not by law obliged to make any other lease, either for the same, or any other fine or rent, since that would not be the lease which their predecessors covenanted to make, and they could not be bound to do what their predecessors did not covenant should be done: For it was conceived to be clear in law, that one entire covenant cannot be varied or divided; so that if it be not good in the whole,

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whole, it cannot be good in any part. And if an action at law were to be brought on this covenant, the breach to be assigned must be, that the respondents had refused to make a lease for 99 years, with a clause of renewal therein; and not that they had refused to make a lease for 40 years, without a clause of renewal, such refusal being no breach of the covenant. It was likewise worthy consideration, that long leases were no otherwise the cause of dilapidations, or the decay of spiritual livings and hospitality, or the impoverishing of successors, which were the things complained of in the statutes; than as they tied them down to small rents, and cut them off from a power of taking reasonable fines at proper distances of time, in proportion to the true value of the estates demised. To prevent which, the Legislature enacted, that for the future no lease should be made for any longer terms, than in the several acts are specified; whereby the inconveniencies arising from long leases then in being, or any covenants contained in them, might not continue any longer than till such leases were expired: But if the respondents should now be decreed to grant a 40 years lease, for the fine and rent covenanted by the old lease, they would then be subjected 40 years longer, to the same inconveniencies from which the Legislature intended to relieve them, upon the expiration of such leases. And should the Doctors, upon the expiration of that lease, apply to the Court of Chancery for another upon the same terms, the decree might be offered as a precedent for granting it, and so on for ever, at the expiration of each respective lease: By which means, Courts of Equity would be made subservient to the evasion of the above mentioned statutes, and to the perpetuating upon the respondents and their successors, the inconveniencies from which the Legislature intended they should at this period of time be delivered. And tho' it must be admitted, that this lease and covenant were, at the time of their being made, good in law, churches and colleges having the fee-simple in them by the common law, and not being restrained before these disabling statutes, from disposing of, and even alienating their possessions as they thought proper; yet such long leases, which by these statutes are declared to be unreasonable and of very ill consequence, most certainly were so before they were prohibited: For it must be allowed, that the original founders intended, that the members for the time being, should enjoy only the revenues arising from their benefactions, during their continuance

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tinuance in these colleges, &c. and transmit them to their successors without diminution: And therefore, for the then Dean and Chapter to grant so long a lease, under so small a reserved rent, and to oblige their successors to renew at the end of it for so trifling a fine, seemed not to have been consistent with their trust; * and if the lessees were without remedy at law, it was submitted, whether a Court of Equity ought, in such a case, to give any extraordinary assistance beyond what the rules of law will allow.

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AFTER hearing counsel on this appeal, on *Saturday* the 11th of *May*, 1728, it was ORDERED, that the Judges should, on *Monday* next, deliver their opinions *seriatim*, on the following point; viz. "Whether, consistently with the several restraining statutes insisted on at the bar, any and what obligation lies on the Dean and Chapter of *St. Paul*, from the covenant now in dispute."

ACCORDINGLY, on the 13th all the Judges attended; and having delivered their opinions *seriatim*, upon the question proposed, it was ORDERED and ADJUDGED, that the decree complained of should be reversed; and that the respondents the Dean and Chapter should, on the surrender or determination of the present lease in being, dated the 20th of *February*, 1670, make a new lease to the Master, Fellows and Scholars of *Trinity Hall* in *Cambridge*, for 40 years, for a fine of 20*l.* and under the ancient rents, with the covenants and conditions in the old lease contained, except the covenant for renewal; which lease for 40 years was to be accepted by *Trinity Hall*, subject to the same qualified trusts to which the present lease was subject: And that the Court of Chancery should cause this order and judgment to be put in execution accordingly.

DECREE
reversed.
Jour. vol. 23.
p. 261. 262.

* It was an allowed cause of deprivation, if an Abbot aliened the possessions of his House. 2 *Roll's ab.* 222.

Case 59.

William Glegg, Esq; and Grace Glegg } Appellants.
his sister,

Juliana Glegg, Widow, Mary Glegg,
an Infant, *Dame Mary Newdigate,* } Respondents.
Widow, and *William Stevens,*

15th May, 1728.

Viner, vol. 5.
p. 511. ca. 21.
2 Eq. ab. 27.
ca. 32.

BY a settlement dated the 30th of July, 30 Car. II. between *Edward Glegg* and *Judith* his wife, and *William*, afterwards *Sir William Glegg* their son, of the first part, *Sir Robert Cotton* and other trustees of the second part, and *Sir Thomas Mainwaring* and *John Lacon, Esq;* of the third part, in consideration of a marriage had between the said *William Glegg* and *Elizabeth* his wife, and in performance of articles made before the marriage; it was agreed, that common recoveries should be suffered of all the premises therein mentioned; the uses whereof were declared to be — As to the premises in the city of *Chester*, or the liberties thereof, to the use of *William Glegg* and *Elizabeth* his wife, and the survivor for life, in part of *Elizabeth's* jointure; and as to *House-Pensby cum Pertin* in trust, that *William Glegg* and *Elizabeth* and the survivor of them, in full of *Elizabeth's* jointure, and in bar of her dower, should receive thereout the yearly rent of 20*l.* with a power of distress: And as to part of *Gayton demesne*, in trust that the said *Judith*, if she survived *Edward Glegg* her husband, should receive thereout 60*l. per ann.* for her jointure, and in bar of her dower, with a power of distress: And as to *House-Pensby*, subject to the said rents and power of distress, and all the rest of the premises whereof no use was before limited, except *Elizabeth's* jointure, to the use of *Edward Glegg* for life, *sans* waste; remainder to *William Glegg* for life, *sans* waste; then to *Mainwaring* and *Lacon* for 99 years; remainder to trustees and their heirs to preserve contingent remainders; remainder to the use of the first and every other son of the said *William* and *Elizabeth Glegg*, in tail general; remainder to *Edward Glegg*, and the heirs male of his body; remainder to the right heirs of *Edward Glegg* in fee. With a power for *William Glegg*, if he

he should have two or more issue male by *Elizabeth* his wife that should survive him, to charge any part of the premises, except the lands charged with the several rent-charges, and the jointure lands limited to *Elizabeth*, with an annuity not exceeding 50*l.* *per ann.* to the second son, if but one; but if two or more younger sons, with any sum not exceeding 30*l.* a-piece *per ann.* with power of distress. And the trusts of the term of 99 years were, that if *William Glegg* had two or more daughters, to raise out of the rents, issues and profits 2000*l.* to be equally divided amongst them, payable at 18, or marriage; with maintenance in the mean time, after the death of *Elizabeth*.

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William Glegg had two sons, *Robert* and the appellant *William*, and three daughters, *Elizabeth*, *Mary*, and the appellant *Grace*; the two first received their shares of the 2000*l.* but *Grace* did not receive hers, being 666*l.* 13*s.* 4*d.* and there became due to her 1000*l.* and upwards, for principal and interest of this portion.

By marriage articles dated the 24th of *August*, 1710, between the said *Robert Glegg* of the first part, the respondent *Juliana* of the second part, Sir *Richard Newdigate*, Bart. her brother, and the respondent *William Stevens* and the appellant *William* of the third part; reciting a marriage intended between *Robert Glegg* and *Juliana*, and that she was entitled to 5000*l.* portion, whereof *Robert Glegg* was to have 4800*l.* and *Juliana* the remaining 200*l.* for her own use; in consideration thereof, *Robert Glegg* covenanted with Sir *Richard Newdigate* and the respondent *Stevens* and the appellant *William*, in nine months, by such conveyance as the counsel of Sir *Richard* should advise, to convey to him and *Stevens* and their heirs, or such other persons as should be thought meet, the manor of *Gayton* and all his lands, &c. in *Gayton*, the manor of *Pensby* with its rights, &c. and all his lands in *Chester* and *Flint*, except Lady *Glegg's* jointure, to the following uses, viz.

That the appellant *William* should have a rent-charge of 50*l.* *per ann.* for life, tax free, out of all the premises not limited in jointure to the respondent *Juliana*, payable at *Lady-day* and *Michaelmas*, with a power of distress; and as to all the rest of the said manors, lands, &c. to the use of *Robert Glegg* for life, sans waste; remainder to trustees to preserve contingent remainders; and after his decease, as to the manor of *Pensby* and a farm

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farm in *Gayton*, which are therein mentioned to be of the yearly value of 500*l.* to the use of the respondent *Juliana* for her life, for her jointure and in bar of her dower; and also to the intent, that a competent part of the premises not limited in jointure to the respondent *Juliana*, should be limited to trustees for 200 years, to commence from *Robert Glegg's* death, on trust to raise 3000*l.* for portions for the daughters of that marriage, with such maintenance as should be thought fit: Remainder to the first and every other son of *Robert Glegg* in tail male; remainder to *Robert Glegg* and the heirs male of his body; remainder to the appellant *William Glegg* and the heirs male of his body; remainder to the right heirs of *Robert Glegg* in fee. — With a power to lease any part of the premises for 21 years at the then rents; and a covenant that the premises were free from incumbrances, except *Lady Glegg's* jointure, the 50*l.* per ann. to the appellant *William* for life, and the 2000*l.* for *Robert Glegg's* sisters portions; with other usual covenants. — And it was thereby agreed, that it should be lawful, by any writing under the hands and seals of *Robert Glegg, Juliana, Sir Richard Newdigate, Stevens* and *William Glegg*, and not otherwise, to make any additions or alterations in the said marriage settlement, as they should think fit.

The marriage was afterwards had, and by deeds of lease and release dated the 12th and 13th of *July*, 1713, between *Robert Glegg* and the respondent *Juliana* of the first part, *John Glegg* and *Richard Cottingham* of the second part, and *Sir Richard Newdigate* and *William Stevens* of the third part; after reciting the articles, it was agreed, that *Robert Glegg* and *Juliana* should levy several fines to *John Glegg* and *Cottingham*, of all the premises in *Cheshire* and *Flint*, to make them tenants to the precipe for suffering several common recoveries; the uses whereof were thereby declared as follow, viz. As to the manors of *Mollington* and *Gayton*, with their rights, &c. (*Richardson's* farm excepted) and all the messuages, lands, &c. of *Robert Glegg*, in the counties of *Chester* and *Flint*, to the use of *Robert Glegg* for life, sans waste; remainder to *Newdigate* and *Stevens* their executors, &c. for 200 years; and as for the manor of *Pensby* with its rights, &c. and *Richardson's* farm, with their appurtenances, to the use of *Robert* and *Juliana* for their lives and the life of the survivor of them, for *Juliana's* jointure; and as to the premises in *Handbridge*, or elsewhere in the city

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of *Chester*, and all the residue of the premises, whereof no use was before declared, to *Robert* for life; remainder of the whole to trustees to preserve contingent remainders; remainder to the first and every other son of *Robert Glegg* in tail male; remainder to the heirs male of his body; remainder to the right heirs of *Robert Glegg* in fee.—The trusts of the 200 years term were declared to be, that in case there should be one or more daughter or daughters of the marriage at the decease of *Robert*, by sale or mortgage, or by the rents till sale, to raise portions for such daughter or daughters, viz. if but one, 3000*l.* to be paid her at the age of 21, or marriage; if two or more, then 3000*l.* to be equally divided between them, at the age of 21 or marriage; and in case any such daughter or daughters should die before her or their portion or portions should be payable, then the portion of her or them so dying, should be paid unto and be equally divided amongst the survivor or survivors, when the original portion or portions of such surviving daughter or daughters should become payable; and in trust, out of the rents and profits, in the mean time, until such daughters portions should become payable, to raise and pay such yearly sum or sums for the maintenance of such daughter and daughters, as *Newdigate* and *Stevens* should judge convenient, not exceeding the interest of their respective portions, at 5*l.* per cent.

In *December*, 1723, *Robert Glegg* died, leaving issue one son, named *Edward*, who died on the 30th of *March*, 1725, and two daughters, *Juliana*, who died on the 26th of *April*, 1725, and the respondent *Mary*.

In *December*, 1725, the respondents *Juliana* and her daughter *Mary* filed their bill against the appellants *William* and *Grace* and the trustees, stating the above articles and settlement, and praying to have a recompence or satisfaction out of that part of the estate of *Robert Glegg*, settled on the appellant *William*, for the deficiency of her jointure, which, as she alledged, was but 280*l.* per ann. and to have the same made up to her 500*l.* per ann.; and also to have 150*l.* per ann. raised for the maintenance of the respondent *Mary*, till her portion of 3000*l.* should become payable, who was then about 14 years of age; the trustees having made an appointment for that purpose.

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The appellant *William*, by his answer insisted, that he was an entire stranger to the value of the lands agreed by the articles to be limited to the respondent *Juliana* for her jointure, and tho' these lands might be given in as of the value of 500*l.* *per ann.* yet the articles did not amount to a covenant to make up the same 500*l.* *per ann.*; that the respondent *Juliana* had, before the execution of the articles, enquired by her agent into the value of the lands intended to be limited to her for jointure, and tho' the settlement made pursuant to those articles, was not made till several years after the marriage, and no other lands were thereby limited for her jointure, but what were mentioned in the articles, yet no notice was taken in the settlement of any particular value these lands were to be of, nor was there any covenant that they should be of the value of 500*l.* *per ann.* and that therefore he was not obliged to make up the lands to be 500*l.* *per ann.* And the appellant *William* likewise insisted, that by the articles there was no express mention of what sum was to be paid for the maintenance of the respondent *Mary*, nor who should settle the *quantum*; and that 60*l.* *per ann.* was sufficient. And the appellant *Grace* insisted, that the money due to her for her portion, by virtue of her father's settlement, and thereby charged upon the estate, ought to be paid.

Issue being joined, and divers witnesses examined, the cause came on to be heard before his Honour the Master of the Rolls, on the 28th of *June*, 1727; who was pleased to declare, that the articles imported an agreement to settle lands of 500*l.* value *per ann.* in jointure on the respondent *Juliana*, and that the particular lands limited to her, were given in of that yearly value, and that the appellant *William* being a party to, and transacting that agreement, ought to be bound thereby, and that the whole estate of *Robert Glegg*, deceased, was liable to make good the said jointure; and therefore decreed, that it should be referred to a Master, to examine what was the yearly value of the lands mentioned in the jointure deed, and to set apart so much more lands as would make them up 500*l.* *per ann.*; and that the appellant *William Glegg* should execute proper conveyances, to settle such lands on the respondent *Juliana* for life, for her jointure; and that the Master should examine what the lands settled on the respondent *Juliana* had fallen short of 500*l.* *per ann.* and that the appellant *William Glegg* should account for what he, or any person for his use, had received of the

the rents and profits of the other lands, since the death of Edward Glegg the son; for discovery whereof, the usual directions were given. And it was further ordered, that the appellant William should, out of what, upon the said account, should appear to be in his hands, pay to Juliana what the lands settled on her in jointure fell short of 500*l. per ann.*; and if what should appear to be in his hands should not be sufficient to pay the respondent Juliana, what the lands settled on her had fallen short of 500*l. per ann.* then the Master should compute what was due for the appellant Grace's portion and interest, and tax her costs; and on the respondent Juliana's paying the appellant Grace what should be certified due for her portion, interest and costs, the said respondent Juliana was to hold over the estate, until she should be repaid, with interest for the same, together with the arrears of her jointure. And as to the respondent Mary, the Court declared, that the trustees had a power to appoint what they thought fit, not exceeding the interest of the 3000*l.* portion, at 5*l. per cent.* for her maintenance; and they having appointed 150*l. per ann.* his Honour ordered the same to be paid, until her portion became payable, and then she was to be at liberty to apply to have it raised; and if the 150*l. per ann.* should not be duly paid, then the respondents Mary and Juliana were to be at liberty to apply to the Court to have a receiver appointed; and the Master was to examine what was fit to be allowed the respondent Juliana for the maintenance of Mary, for the time past and to come, and to state the same to the Court for further directions; and after deduction of what should be allowed for the respondent Mary's maintenance, the 150*l. per ann.* was to be placed out at interest for the benefit of the respondent Mary, till she attained 21, and then the same was to be paid her; And it was further ordered, that the respondents Juliana and Mary should pay the trustees their costs to be taxed, and that the appellant William should pay the respondents Juliana and Mary their costs to be taxed, together with such costs as they should pay the trustees.

From this decree the present appeal was brought; and on P. Yorke. behalf of the appellant William it was contended, that he ought W. Hamilton. not to have been decreed to make good the jointure 500*l. per ann.* as there was no covenant for that purpose, either in the marriage articles or settlement, altho' the lands intended to be settled for the jointure were particularly mentioned in both.

That

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That the appellant *William* ought not to have been decreed to pay 150*l.* for the respondent *Mary's* maintenance, from the death of *Edward Glegg* her brother, she being then but 13 years of age, and entitled only to a portion of 1500*l.* as her sister *Juliana* was then living; and tho' the trustees did make an appointment for this purpose, yet they had no such power by the articles, nor was the appellant *William* any party to the settlement made after the marriage. That he was decreed to account for the whole profits of the estate received since the death of *Edward Glegg*, and pay the same to the respondent *Juliana*, to make up the deficiency of her jointure lands; altho' the same was also liable to the demands of the appellant *Grace*, for her portion and interest, and to the appellant *William's* annuity of 50*l. per ann.* which was excepted both in the articles and settlement as an incumbrance on the estate.—The appellant *Grace* conceived herself to be aggrieved by the decree, because there was no absolute direction that she should be paid her principal, interest and costs in a reasonable time; and also, because her demands were postponed to those of the respondents *Juliana* and *Mary*, altho' she claimed under a prior settlement.

C. Talbot.

T. Lutwyche.

On the other side it was insisted, that the respondent *Juliana* was a purchaser for a valuable consideration of her jointure lands; and it being expressed in the articles, that the lands thereby covenanted to be limited in jointure were 500*l. per ann.* that amounted to an agreement that they were of that value, and was a sufficient foundation for making them up 500*l. per ann.* out of *Robert Glegg's* real estate; especially as against the appellant *William*, who was a party to, and executed the articles, and was concerned in the treaty and transaction touching the settlement; and by means of those articles, became entitled to the estate of *Robert Glegg*, without any consideration moving from him, subject to the jointure and to the maintenance and portion of the respondent *Mary*. That upon the treaty for the marriage, and previous to the execution of the articles, it was insisted upon, that the portions of the daughters, on failure of issue male, should be the amount of the mother's fortune, as in such cases is usual; but the respondent *Juliana* gave way, so that only 3000*l.* was limited. There being, however, both by the articles and settlement, a discretionary power in the trustees to appoint maintenance, not exceeding

5l. per cent. per ann. for the 3000l. portion, they, on considering all the circumstances of the case, and that the respondent *Mary* was heir at law to *Robert Glegg*, and would have been entitled to the inheritance of the estate, if the same had not been voluntarily settled by him upon the appellant, appointed the full interest of the portion for her maintenance: And as such appointment was reasonable, and the trustees had not exceeded their power therein, the directions of the decree touching this maintenance, were very agreeable to equity and justice. As to the appellant *Grace*, it was apprehended that she had no cause to complain of the decree; for whatever demand she should appear to have on the estate of *Robert Glegg*, she was to be paid the same, with interest and costs, by the respondent *Juliana*, upon assigning her interest therein. It was therefore hoped, that the decree would be affirmed, and the appeal dismissed with costs.

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BUT, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree complained of, so far as it concerned the appellants, or either of them, should be reversed: And then the following directions were given.——“ And it is “ further ORDERED, that it be and is hereby referred to Mr. “ *Thurston*, one of the Masters of the Court of Chancery in “ the decree named, to examine what is the yearly value of the “ lands by the marriage articles agreed to be settled; and afterwards by the settlement made in pursuance thereof, actually “ settled upon the respondent *Juliana*, one of the plaintiffs in “ the cause, for her jointure; and to allot and set apart so much “ of the other lands in the said articles and settlement comprised, as, together with the said lands already settled, will “ make up an estate of 500l. per ann. according to the intention of the said articles; and that the appellant *William Glegg*, one of the defendants in the Court below, do execute “ proper conveyances, by recovery and otherwise as the Master “ shall direct, to settle such lands so to be allotted, on the said “ plaintiff *Juliana* for her life, for her jointure, free from all “ incumbrances by him the said *William Glegg*: And it is further ORDERED, that the said Master do examine how much “ the plaintiff *Juliana* hath been damnified, from the death of “ *Edward Glegg* her son, by reason of her jointure not being “ 500l. per ann.; and that the same, together with what she “ shall be further damnified, before such settlement hereby “ ordered for making up her jointure as aforesaid shall be per-

DECREE reversed, with directions. Jour. vol. 23. p. 265.

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“ fected, be made good to the said *Juliana* out of the other
 “ lands in the said articles and settlement comprised, and not
 “ settled upon her, and out of the rents and profits thereof,
 “ from the time of the bill exhibited: And it is further
 “ ORDERED, that the said defendant *William Glegg* do come to
 “ an account before the said Master, for what he, or any other
 “ person for his use, hath received by and out of the rents and
 “ profits of the said other lands, since the time of the bill
 “ filed; for the better discovery whereof, the said defendant
 “ is upon oath to produce before the said Master, all the books
 “ of account, papers and writings, which he has in his custody
 “ or power relating thereto, and is to be examined on inter-
 “ rogatories, as the said Master shall direct; and in taking of the
 “ said account, the said Master is to make unto the said defen-
 “ dant all just allowances: And the said *William Glegg* shall
 “ likewise come to an account before the said Master, for what
 “ he, or any other person for his use, hath received from the
 “ said *Robert Glegg*, deceased, or his order, in part or upon
 “ account of the money for which he contracted (according to
 “ the confession in his answer) to sell his annuity of 50 *l. per*
 “ *ann.* in the articles mentioned, to the said *Robert*; for the
 “ better discovery whereof, he the said *William Glegg* is to be
 “ examined upon interrogatories, as the said Master shall direct:
 “ And in case any part of the price of such annuity still remains
 “ due and unpaid, the said *William Glegg* is to be allowed the
 “ same, upon the said account, out of the profits so as aforesaid
 “ by him received: And it is further ORDERED, that the
 “ defendant *William Glegg*, out of what shall appear to be in
 “ his hands upon the said account, after just allowances made,
 “ and deduction of what remains due to the said *William Glegg*,
 “ for the sale of his said annuity as aforesaid, do and shall pay
 “ unto the said plaintiff *Juliana* what she hath been, or shall
 “ as aforesaid be damnified by the deficiency of her jointure of
 “ 500 *l. per ann.*: And in case what shall appear to be in his
 “ hands as aforesaid, shall not be sufficient to pay to the plain-
 “ tiff *Juliana*, what is decreed to be paid her for the said defi-
 “ ciency as aforesaid, then the Master is forthwith to compute
 “ what is due to the appellant *Grace Glegg*, one other of the
 “ defendants, for her portion and interest; and is to tax her
 “ her costs of this suit, and appoint a time and place for pay-
 “ ment of the same; and upon the plaintiff *Juliana*’s paying unto
 “ the defendant *Grace Glegg*, what the said Master shall certify
 “ to be due for her portion, interest and costs as aforesaid, the
 “ plaintiff

"plaintiff is to hold over the said estate, and have the benefit
 "of the term for securing the said *Grace's* portion, until she
 "shall be repaid what she shall so pay to the defendant *Grace*,
 "with interest for the same, to be computed by the said
 "Master, together with what shall remain unsatisfied for the
 "arrears of her jointure as aforesaid. But in case the said
 "*Juliana* shall not think fit to proceed in taking the account
 "of what is due to the said *Grace* as aforesaid, or do not pay
 "what shall be certified to be due to the said *Grace*, at the time
 "and place appointed by the said Master; then, and in either
 "of the said cases, the plaintiff's bill, as against the said
 "defendant *Grace Glegg*, shall, from the time of such default,
 "stand absolutely dismissed out of the said Court of Chancery,
 "with costs to be taxed by the said Master, and paid by the said
 "plaintiff *Juliana* to the said defendant *Grace*: And as to the
 "respondent *Mary Glegg*, another of the plaintiffs in the ori-
 "ginal bill, it is further ORDERED and decreed, that the sum
 "of 100*l.* *per ann.* and no more, be allowed and paid for her
 "maintenance, according to the said articles and settlement,
 "until her portion shall become due; and the same, with the
 "arrears thereof, shall be paid to the hands of the plaintiff
 "*Juliana* for that purpose, so long as she shall continue to
 "maintain and provide for the said *Mary*, or until the Court
 "of Chancery shall otherwise order; and in case the same shall
 "not be duly paid, the plaintiffs are to be at liberty to apply
 "to the Court of Chancery to have a receiver appointed of the
 "said estate, or such other method taken as shall be just; and
 "if any order hath been already made for such receiver, the
 "said order, so far as concerns the raising the said sum of 100*l.*
 "*per ann.* and no more, is to stand until the Court of Chan-
 "cery shall otherwise order: And it is further ORDERED, that
 "the plaintiffs do pay unto the defendant *William Stevens*,
 "one of the trustees, and unto the representatives of the other
 "defendant *Sir Richard Newdigate*, deceased, another trustee,
 "their costs of the said suit in the Court of Chancery, to be
 "taxed by the said Master; and that the defendant *William*
 "*Glegg* do pay unto the plaintiffs their costs of the said suit in
 "the Court of Chancery, to be taxed by the said Master, together
 "with such costs as they shall pay to the trustees as aforesaid.
 "And it is further ORDERED, that the Court of Chancery do
 "cause this order and judgment to be duly put in execution,
 "according to the intent thereof in every particular."

William

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Case 60.

William Errington,

Appellant.

*John Carrick, Son and Heir of Ann**Errington, deceased, Thomas Lor-**raine and Jane his Wife, John Rob-**son and Margaret his Wife, and**Frances Errington, Spinster; which**said Ann, Jane, Margaret and Fran-**ces, were the four Sisters and Coheirs**of Edward Errington, deceased, Tho-**mas Errington, Richard Ridley, Vi-**cholas Fenwick and Christopher Soulbby,*

21st May, 1728.

9 Mod. 33.
2 Wms. 361.
M. zeley, p. 8.
2 Eq. ab. 623.
ca. 13. 624.
ca. 20. 625.
ca. 21. 22. 23.

EDWARD Errington, the cousin and heir at law of *William Errington*, an infant, who was entitled to and in possession of the estate in question, which was an antient family estate of about 400*l.* per ann. did, in the life-time of the infant, by indenture dated the 15th of October, 1714, covenant to levy a fine of the said estate to the respondents *Ridley* and *Fenwick*, and their heirs; and by another indenture, dated the 19th of the same month, it was declared and agreed, that the said fine should enure to the use of the said *Edward Errington* for life, without impeachment of waste; remainder to a trustee and his heirs to preserve contingent uses; remainder to the first and other sons of *Edward Errington* in tail male; remainder to the respondent *Thomas Errington* for life, without impeachment of waste; remainder to the trustee and his heirs, to preserve contingent uses; remainder to the first and other sons of the respondent *Thomas Errington* in tail male; remainder to the appellant for life, without impeachment of waste; with the like remainder to preserve contingent uses; remainder to the first and other sons of the appellant in tail male; with remainder to the said *Edward Errington* in fee.

The fine was accordingly levied, and in the year 1716, the infant died without issue; whereupon the estate descended to the said *Edward Errington*, as his heir at law, and he entered and became seised thereof accordingly: But being desirous to supply any defect which might be in the said settlement, and being indebted to the respondent *Thomas Errington*, the appellant's uncle, in three several bonds, one for 100*l.* another for 50*l.* and another for 20*l.* and interest; he the said *Edward Errington*, by indentures of lease and release dated the 21st and 22d of *April*, 1718, and by fine thereupon levied, in consideration of 200*l.* therein mentioned to be paid to him by the respondents *Ridley* and *Fenwick*, (but which was really the money of the respondent *Thomas Errington* then computed to be due on the said three bonds) and for other considerations, did grant and convey the estate in question to *Ridley* and *Fenwick* and their heirs, to the use of him the said *Edward Errington* for life; with remainders to his first and other sons in tail male; remainder over to *Ridley* and *Fenwick* and their heirs, subject to be charged with such provision for the wife, daughters and younger children of the said *Edward Errington*, as therein expressed.

The respondents *Ridley* and *Fenwick*, by indenture executed the same day, but dated the day after, being the 23d of *April*, 1718, did declare, that the 200*l.* mentioned in the said indenture of release to be by them paid to the said *Edward Errington*, for the purchase of the reversion and inheritance of the premises, was the proper money of the respondent *Thomas Errington*; and that their names were made use of in the said indentures of lease and release, and other conveyances of the premises, from and after the death of the said *Edward Errington*, without issue male, and liable to be charged as therein mentioned, in trust only for the respondent *Thomas Errington* and his assigns for his life, without impeachment of waste; remainder to a trustee for preserving contingent remainders; remainder to the first and other sons of the said *Thomas Errington*, in tail male; remainder to the appellant for life, without impeachment of waste; with the like remainder to preserve contingent uses; remainder to the first and other sons of the appellant in tail male; with remainder in fee to the said *Edward Errington*.

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In September, 1719, *Edward Errington* died without issue; and thereupon the respondent *Thomas Errington* entered on the estate. But in *Michaelmas* term, 1719, the respondents, *Garrick*, *Lorraine* and wife, and *Robson* and wife, exhibited their bill in Chancery against him, and also against the appellant and the respondents *Ridley*, *Fenwick*, *Soulby* and *Frances Errington*, and others, charging, that the respondent *Thomas Errington* and the appellant were papists, and therefore by the statute of the 11th and 12th of *William III.* were disabled to take by purchase, any interest in lands: That *Edward Errington* was infirm and weak in body and mind, and not sensible when he executed the said several conveyances; that the 200*l.* consideration money was not paid, but inserted only in the said indenture of release to colour the same; and that the said deeds seemed to have been gained by fraud or imposition: And therefore the bill prayed, that the plaintiffs might be put into possession of the premises, or at least, that they might be at liberty to try their title at law, without being prejudiced by the deeds of *April*, 1718.

To this bill the several defendants put in their answers; and the appellant by his answer, denied that he was a papist, or that he ever professed the popish religion; but said he was a protestant, of the communion of the church of *England* as by law established: And insisted, that the respondents *Jane Lorraine*, *Margaret Robson* and *Frances Errington*, were papists; that the respondent *Carrick's* mother was also a papist; and that *Edward Errington* was in good health, and of sound memory and understanding at the time of executing the said conveyances, and well understood the contents thereof; and therefore the appellant insisted on the benefit of such conveyances.

The cause being at issue, divers witnesses were examined on both sides, and upon hearing the same before the Lord Chancellor *Macclesfield*, on the 16th of *June*, 1724; his Lordship was pleased to declare, that there was a gross imposition upon the said *Edward Errington*, in obtaining the said deed of settlement from him; and that the person who obtained the same ought not to have any benefit thereby: But to the end the whole case might be before the Court before further judgment given, his Lordship ordered, that it should be referred to *Mr. Bennett* one of the Masters of the Court, to enquire and

see when the said deed and the said declaration of trust from the respondents *Ridley* and *Fenwick* were executed, as also to enquire what was the consideration of the two bonds for 100*l.* and 50*l.* entered into by *Edward Errington* to the respondent *Thomas Errington*, and to state these several matters specially to the Court; and after the Master should have made his report, the cause was to come on again for the further direction of the Court: And in the mean time, it was referred to the Master to appoint a receiver.

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The Master appointed a receiver accordingly, and by his report dated the 5th of *February*, 1725, certified, that the execution of the deeds of lease and release and declaration of trust, and the payment of the consideration money of the said two bonds, were proved before him.

The cause coming to be heard on the Master's report before the Lord Chancellor *King*, on the 17th of *June*, 1726, his Lordship was pleased to declare, that it having been already declared upon the former hearing, that there was a gross imposition on *Edward Errington*, in obtaining the deed of settlement, and that the person who obtained the same ought to have no benefit thereby, the Court could not then enter into the matter of fraud; but that the said deed of settlement ought to be taken to have been fraudulently obtained, according as was declared in the said order; and did therefore decree, that the said settlement should be delivered up to the plaintiffs to be cancelled; and it was referred to the Master, to take an account of the profits of the estate in question, received by the respondent *Thomas Errington*, since the death of the said *Edward Errington*, discounting thereout what was due to him for principal and interest on the said three bonds, and thereupon the said bonds were to be delivered up: And the surplus of the said profits was to be divided into four parts, and the respondents the coheirs of *Edward Errington*, were each of them to have one fourth part; and the receiver of the estate was to account before the Master, and pay the money in his hands in like manner, and deliver possession of the estate to the said coheirs, and the tenants were to attorn and pay their rents accordingly.

The appellant and the respondent *Thomas Errington* conceiving themselves aggrieved by the said orders of the 16th of *June*, 1724, and 17th of *June*, 1726, petitioned for a rehear-

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ing of the cause; which being granted, the same was reheard on the 12th of *November*, 1726, when his Lordship ordered, that both the said former orders should be reversed; and declared, that he saw no cause to set aside the settlement made by *Edward Errington*; but that the respondent *Thomas Errington*, to whom a trust for life was limited for his benefit, being a person professing the popish religion, the trust was void by the statute of the 11th and 12th of *William III.* and that during his life, the plaintiffs and the defendant *Frances Errington*, the coheirs of the said *Edward Errington*, were entitled to the rents and profits of the estate from the death of *Edward Errington*; and therefore referred it to the Master, to take an account of the profits of the estate received by the respondent *Thomas Errington*, since the death of *Edward*; and what the Master should certify to be remaining in his hands, after all just allowances, was to be paid by him to the respondents the coheirs of *Edward Errington*, viz. to each a fourth part thereof, and the receiver was also to account and pay the rents in his hands in like manner; and he was likewise to deliver possession of the estate to the said respondents the coheirs, and the tenants were to attorn and pay their rents to them.

P. Yorke.
W. Lee.

From that part of this decree which directed possession of the estate to be delivered, and the profits to be accounted for to the coheirs, during the life of the respondent *Thomas Errington*, the present appeal was brought; and on behalf of the appellant it was contended, that *Edward Errington* having by the settlements conveyed away the whole estate, subject to the uses and trusts expressly declared, his heirs at law were thereby excluded from having any benefit of this estate, till after all the particular intermediate uses were spent; and therefore to raise a trust by implication in favour of the heirs at law, during the life of the respondent *Thomas Errington*, out of the supposed estate of *Soulby* the trustee to preserve the contingent uses, was to give them a preference to the particular uses to which they were expressly postponed by *Edward Errington* the grantor, who had an absolute power over the estate. That where an estate is limited to a person incapable of taking, the next remainder ought according to the rules of law to take place immediately; and consequently, *Thomas Errington* being incapable to take by the act of 11 & 12 *Will. III.* and having no issue, the appellant was entitled to be let into the percep-

tion

tion of the profits immediately upon the death of *Edward Errington* without issue, there being no intervening equitable estate to prevent him. For though the legal estate should be taken to be in *Soulby* to preserve the contingent uses, which possibly might never arise, yet since the trusts annexed to that estate were void to all other purposes, it ought not to be any impediment to the appellant's enjoying the benefit of the estate; nor have any farther effect, than to preserve the legal interest in the trustee, for that contingent purpose for which alone it could be good, viz. to let in the sons of *Thomas Errington*, in case he should have any; and not to obstruct the limitations of the settlement in any other respect, much less to prefer the grantor's heirs at law to the appellant, contrary to his express intent declared in the deed. But supposing there was a resulting trust during the life of *Thomas Errington*, yet that trust arose upon the settlement of 1714, which was good by estoppel; and *Edward Errington* had a power to dispose of it, and accordingly did so by the subsequent settlement of 1718; consequently, that trust estate being no way necessary to preserve the contingent remainders under the settlement of 1718, would now vest in the appellant, there being no person *in esse*, capable of taking it before him. It was therefore hoped, that the decree would be reversed in the particulars before mentioned, and that the bill would be dismissed with costs.

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On the other side it was insisted, that the decree was just, and that the appellant was not by the settlement to take any estate, until the death of *Thomas Errington* without issue male, who might have issue male that might be protestants. That *Thomas* being a papist, and disabled to take by virtue of the statute, and the appellant not being entitled until *Thomas* should be dead without male issue, the premises during the life of *Thomas*, ought to go and belong to the heirs at law of *Edward* who made the settlement, as an estate undisposed of by him.

W. Peere Williams.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of, affirmed: And it was further ORDERED, that the appellant should pay to the respondent *Christopher Soulby*, 20*l.* for his costs sustained by reason of bringing the appeal.

DECREE affirmed. Jour. vol. 23. p. 274.

Case 61. *Hugh, Lord Archbishop of Armagh,* } Plaintiffs }
and Nathaniel Whaley, Clerk, } in Error. }
The King's Attorney-general, Defendant }
J. L. Fitzgibbon. 30. 26th February, 1728.

THE Deanery of *Armagh* is in the gift of the Crown, but the advowson of the rectory of *Armagh* belongs to the Archbishop of *Armagh* and his successors. And these two preferments having been enjoyed for several turns by one and the same person, it was imagined that the rectory was a part, or member of the Deanery, tho' not really so.

In the year 1681, Dr. *Bartholomew Vigors* obtained a grant of the Deanery from the Crown; and afterwards prevailed on the then Archbishop, to collate him to the rectory of *Armagh*, as belonging to the Archbishop, in right of his see.

In 1690, Dr. *Vigors* being promoted to the Bishoprick of *Leighlin* and *Ferns*, Dr. *Peter Drelincourt* obtained from the Crown a donation of the Deanery of *Armagh*, and was also instituted and inducted to the church in question, tho' there was no formal collation of him: He, however, enjoyed the rectory with the Deanery for 31 years, it being never doubted in all that time, but that the Crown intended he should enjoy the rectory as well as the Deanery, or that he was well and legally possessed of them.

In January, 1721, Bishop *Vigors* died, and in March following, Dr. *Drelincourt* died in quiet possession of both these preferments.

In May, 1722, *Thomas*, then Lord Archbishop of *Armagh*, collated the plaintiff *Whaley* to the rectory of *Armagh*, to which he was immediately after inducted: And much about the same time, or not long after, the Reverend Mr. *Richard Daniel* obtained a patent from the Crown, granting to him the Deanery of *Armagh*.

In Michaelmas term, 1724, a writ of *quare impedit* was brought against the present plaintiffs, in the King's Bench in Ireland, in the name of his Majesty; and the Attorney-general set forth in the declaration, that the Archbishop being patron of the rectory of *Armagh*, and it becoming vacant by the promotion of Dr. *Vigors* in 1696, and continuing vacant from that time, to the time of the declaration, by reason of the said promotion, it belonged to his Majesty to present, &c.

The Archbishop in his plea, admitted himself to be patron of the rectory, and that it became void by the promotion of Dr. *Vigors*; by which means, it belonged to their Majesties King *William* and Queen *Mary* to present to the rectory for that turn. But then he said further, that King *William* and Queen *Mary*, in the 3d year of their reign, granted to Dr. *Drelincourt* the Deanery of *Armagh*, with all its rights, members and appurtenances, together with all lands, tenements, tythes, profits, commodities, jurisdictions, emoluments and advantages whatsoever, to the said Deanery belonging, in as full force and beneficial manner, to all intents and purposes, as the said *Bartholomew Vigors*, the late Dean, or any other person before held and enjoyed the same: And that by virtue of these letters patent, the said *Drelincourt* was admitted, instituted, and put in possession of the said church, as a member of the Deanery aforesaid; and that he held and enjoyed the said church till his death. — Then he set forth the succession of Archbishops, to *Thomas* the last Archbishop of *Armagh*, and the death of Dr. *Vigors*, on whose promotion the vacancy happened, and of *Drelincourt*, whereby it belonged to the said *Thomas* late Archbishop of *Armagh*, to collate to the said rectory, and that he collated the plaintiff *Whaley*. And then followed an averment of the plea.

The other plaintiff Mr. *Whaley*, pleaded, that he was Parson *imparsonne* of the aforesaid church of *Armagh*, of the collation of *Thomas* late Archbishop of *Armagh*, and confessed the avoidance of the church by the promotion of Dr. *Vigors*, to the bishopricks of *Leighlin* and *Ferns*; but then he said, that King *William* and Queen *Mary* presented *Peter Drelincourt*, Clerk, to the church in question, and that he was upon that presentation admitted, instituted and inducted to the said church. Then he set forth the succession of Archbishops, to *Thomas* late Archbishop of *Armagh*, and the death of *Vigors* and *Drelincourt* at

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the times above specified; *absque hoc*, that the church continued void by the promotion of *Vigors*, as set forth in the declaration.

Mr. Attorney-general demurred to the Archbishop's plea, and the Archbishop joined in demurrer. And as to Mr. *Whaley's* plea, he replied, that King *William* and Queen *Mary* did not present *Drelincourt* to the rectory of *Armagh*, as was alledged by the plea; and concluded to the country.

To this replication the plaintiff Mr. *Whaley* demurred, and the Attorney-general joined in demurrer.

The case upon the pleadings was this; the King being Patron of the Deanery of *Armagh*, and the Archbishop Patron of the rectory of *Armagh*, and both having become vacant by the promotion of Dr. *Vigors*, who was both Dean and Rector to the bishopricks of *Ferns* and *Leighlin*, the King having a right to dispose as well of the rectory for that turn, as of the Deanery, granted to Dr. *Peter Drelincourt* the Deanery, with all its rights, members and appurtenances, tythes, advantages, &c. And the then Archbishop taking this to be a presentation to, or gift of the rectory by the Crown, as it was probably intended, instituted Dr. *Drelincourt* into the rectory; and he was accordingly inducted, and enjoyed it with the Deanery for upwards of 31 years, and died in possession. Dr. *Vigors*, the Bishop of *Leighlin* and *Ferns*, being dead a short time before him.

Upon arguing this cause in *Ireland*, two points were insisted on by the then defendants, and now plaintiffs in error.

First, That tho' the King had not presented Dr. *Drelincourt*, yet that he having upon the institution of the Bishop, and induction upon that institution, enjoyed the rectory till his death, the King could not present after *Drelincourt's* death; one incumbent having died in possession, after the King's right to present on Bishop *Vigors's* promotion accrued, by which the King's turn was either satisfied or lost.

The second point was, That Bishop *Vigors* being dead before the King presented, the King could have no right to present by his Prerogative so long after, upon the avoidance that was made by the promotion of Bishop *Vigors*.

This

This case was argued very often in the King's Bench in Ireland, after which the Judges having taken almost a year's time to consider of it, did, in Michaelmas term, 1726, give judgment for the defendants on both points.

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Whereupon in Easter or Trinity term, 1727, a writ of error was brought in the name of his Majesty King George I. by which the record was removed into the King's Bench in England. And the Judges of that Court having heard the case argued, were pleased in Easter term, 1728, to reverse the judgment in Ireland.

Whereupon the defendants brought a writ of error in Parliament, and on their behalf it was argued,

As to the first point, that it being admitted in the arguments in both kingdoms, that upon a promotion the Crown is only entitled to supply the vacancy occasioned by that promotion, and to fill the church for that turn; it was conceived, that Dr. Drelincourt having been the actual incumbent of the rectory, and having enjoyed it during his life, and dying in possession, the next turn which the Crown was entitled to after the avoidance made by the promotion, had been served; and if it was not understood to have been filled by the King, then the King had lost his turn. That upon arguing this matter in Westminster-hall, it was apprehended to have been admitted, that if the Archbishop had instituted Dr. Drelincourt upon the presentation of the King, or of any subject, though the presentation had been wrongful, or even void, or if the Archbishop had collated Dr. Drelincourt without title, the institution upon such void presentation or collation would have filled the church, and the King's turn would either have been served or lost. But it was said, that the institution of Dr. Drelincourt being neither upon a presentation or collation, was merely void, and the church no way filled by it: Now it was conceived, that the church of Armagh was really full of Dr. Drelincourt, that he was to all intents and purposes Rector of the parish, and that there was no ground for such a distinction, either in the common or canon law. Dr. Drelincourt was by his institution and induction enabled to serve the cure and receive the tythes, which he could not have had his institution been void; and which it would if he had been a simonist, or had not first subscribed the 39 articles; in both which cases, the institution is declared void by act of Parliament;

T. Lutwyche.

J. Darnell.

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Parliament; but this institution was not void, either by the common, canon, or statute law. It is a known rule in the canon law, that institution gives *jus ad rem, et jus in re*; and altho' after institution upon a void presentation or collation, the church is sometimes in the common law books said to be void, yet it is meant, and is true only with respect to the rightful Patron; so far that he may present his Clerk, as long as his right remains, notwithstanding such institution and induction, and even without first removing the other Clerk by *quare impedit*. But then with respect to the parishioners and all the rest of the world, the former Clerk so instituted, &c. is a real and complete incumbent, and may bring any action for his freehold or his tythes, which one not instituted, or whose institution is void, which is the same thing, cannot do.—Upon this point, therefore, it was hoped, that the judgment in *England* would be reversed.

As to the *second* point, whether the King had a right to present after the death of Bishop *Vigors*? It was conceived, that tho' the Crown may, by its Prerogative, present to the benefice which is made void by the promotion, yet the King may not delay to present to it as long as he pleases, but must do it in the life-time of the person promoted: Because, if the King presents after the death of the person promoted, he presents to a benefice, the right of presenting to which is actually become another's, which would be to do a wrong: And if the King's turn is to take place after so many years, when the person promoted is dead, and the life is not changed before; by the same reason the Church may be kept void, and the Patron deprived of his right for ever. When the King has made the avoidance by promoting the incumbent, it may be reasonable that he should present to the avoidance which he has made by his own act, provided he does it before the Patron's right accrues by the death of his Clerk; for the Patron would not have had any right of presentation at that time, and if the King presents in the life-time of the person promoted, he then gives the Patron one life for another, and takes away nothing from him; because no one can know, whether the new or the old incumbent will die first; and, upon this ground alone it has been adjudged, that this is a reasonable Prerogative.

But

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But it was objected, that the plaintiffs could shew no authorities in law, that the Crown cannot present after the death of the promotee, where the life has not been changed before; and therefore, there is no such restraint upon the Prerogative.—To this, however, it was answered, that the King's Prerogatives must have been immemorial; and therefore, they that alledge any thing to be the Prerogative of the Crown, ought to shew that it has been exercised in the same, or a like instance: It is incumbent on them to produce precedents and authorities for it; but there is not a single authority in all the law books, to shew that the Crown has presented after the death of the person promoted, where the life was not changed before.

It was further objected, that if the King could not present after the death of the promotee, it would be necessary for the Attorney-general to aver the life of such promotee in his declaration, as often as the King should bring his *quare impedit*, to recover his right to present, on account of his promoting a Clerk to a bishoprick.—But to this it was answered, that the King being already entitled to present, by having made an actual avoidance by the promotion, the life of the promotee need not be averred in the Attorney-general's count; but if the person promoted be dead, that should come out on the other side.

There was, however, a *third* point in the case, as it now stood; namely, that the record being removed from *Ireland* by writ of error in the life of the late King, who was the sole plaintiff in it, and he being dead, which appeared to the Judges upon the record; it was apprehended, that this writ of error was absolutely abated, and for that reason the judgment given was erroneous; because the sole plaintiff in this case was dead before the judgment, which was given for the present King, tho' no party to the writ; and because this was a case not within the savings of any of the statutes.

On the other side it was argued, that there could be no doubt but that the King's title, as set forth in the declaration, was good; for, upon the promotion of Dr. *Vigors* to the Bishoprick of *Leighlin* and *Ferns*, the church of *Armagh* was become void by cession; whereby a right accrued to the King to present, as lawful Patron for that turn, by virtue of his Prerogative.

T. Reeves.

N. Fazakerley.

That

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That this Prerogative right of the Crown was now so established, that it could not be controverted; and tho' the King's right to present accrued so long ago as the year 1690, yet, if his turn had not yet been served or satisfied, he still had a right to present; and so would any common person, if he had a right to present as Patron for this turn, notwithstanding the length of time.—That the questions in this case, arose upon the pleas of the Archbishop and the incumbent *Whaley*, and upon the Attorney-general's replication to *Whaley's* plea, viz. I. Whether the Archbishop's plea, to which the Attorney-general had demurred, was a good plea. II. Whether the Attorney-general's replication, to which the incumbent *Whaley* had demurred, was a good replication.

As to the Archbishop's plea, it was conceived to be plainly a bad plea, and therefore nothing contained in it could be of any avail to the plaintiffs in error against the King's title; the plea being inconsistent and repugnant in itself: For it admits, that the Archbishop was seised of the advowson, in right of his archbishoprick, and afterwards derives a title against the Crown, under a grant by the Crown of the Deanery, without shewing that the Deanery was belonging to the archbishoprick; and if it were, the King's grant would not pass it. The plea was also naught, for the causes assigned by the Attorney-general in his demurrer; and especially, because the church of *Armagh* was not averred by the plea to be a member of, or belonging to the Deanery of *Armagh*; and if it were not, the grant of the Crown was nothing to the purpose. Besides, upon this plea, no material issue could properly be taken.—As to the incumbent *Whaley's* plea, he, after confessing the avoidance by the promotion of Dr. *Vigers*, pleaded, that King *William* and Queen *Mary* presented one *Peter Drelincourt*, who, at the presentation of the said King and Queen, was admitted, instituted and inducted; that *Drelincourt* died, and thereupon the defendant *Whaley* was collated to this church by *Thomas Lindsay*, then Archbishop of *Armagh*, on the 5th of May, 1722, &c. Now if this plea was true in fact, it must be admitted, that the King's turn would be served by the presentation of *Drelincourt*; but the fact was denied by the Attorney-general in his replication, and it was agreed to be false by the demurrer of the incumbent *Whaley*, if the replication was good: And if the fact had been true, the incumbent might have taken issue upon the replication, and proved it.

But

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But the following objections were made to the replication :
 I. That the Attorney-general ought to have joined issue on the traverse, at the end of the incumbent's plea, whereby he traversed or denied, that the church was still void by the promotion of Dr. *Vigors* ; and to fortify this objection, it was urged that this was a fact alledged in the declaration, and therefore the defendant might properly tender an issue upon it. II. That the Incumbent had not only pleaded a presentation of *Drelin-court* by King *William* and Queen *Mary*, but also that *Drelin-court*, at their presentation, was admitted, instituted and inducted ; and that the Attorney-general, by his replication, had only denied the presentation of *Drelin-court*, but had given no answer to the institution and induction. And it was urged, that institution and induction, without a presentation, will amount to a collation, and fill the church against the King.

To the first of these objections it was answered, that in the declaration the King's title was first set out, and then it concludes, " And so it belongs to the King to present to the church " so vacant by the promotion of Dr. *Vigors*, and continuing " hitherto vacant ; " which being only alledged, by way of inference and conclusion from what was before stated in the declaration, was not traversable ; but that the King's title before set out ought to be answered. That as this traverse stood upon the facts stated in the Incumbent's plea, it contained nothing but matter of law arising upon those facts ; for if King *William* and Queen *Mary* presented *Drelin-court*, who, upon that presentation, was admitted, instituted and inducted, and afterwards died ; then it was a consequence in law, that the church was not still void by the promotion of Dr. *Vigors*. That this traverse was not at all material, nor should have been taken by the defendant, but his plea would have been good without it ; he had before confessed the King's title, and avoided it by the presentation of *Drelin-court*, which was a complete answer to the King's title ; and it is against a known rule of law in pleading, to confess and avoid, and also to traverse. If therefore the traverse was immaterial and not proper to join issue upon, the Attorney-general had done right in passing it by, and offering an issue by his replication upon the material part of the plea, which was the presentation of *Drelin-court* by King *William* and Queen *Mary*.—To the other objection it was said, that there are two ways of filling a church, viz. by presentation

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presentation, or lawful collation. If this church had been filled by the collation of the Archbishop, the incumbent should have pleaded that the Archbishop did collate; but here he put his case upon the church being filled by the presentation of the Crown, and admission and institution upon that presentation. That the institution and induction were set out in the incumbent's plea, only as executions of the presentation; and the presentation being denied by the Attorney-general, and it being admitted by the incumbent's demurrer, that there was no such presentation, of consequence there could be no institution and induction upon that presentation. Besides, if there were no presentation of *Drelincourt*, his being instituted and inducted would be of no avail to the incumbent, to avoid the King's title; for institution and induction, without a presentation, are merely void against a lawful Patron: And to this purpose, *Green's case*, 6 Co. 29. and *Hunston and Cockett's case*, 2 Croke 252. are authorities in point. The replication, therefore, was conceived to be good, tho' it took no notice of the institution and induction of *Drelincourt*, set out in the incumbent's plea. But another objection arising upon the face of the pleadings, was made to the King's title, viz. that it appeared that Dr. *Vigors*, upon whose promotion the church became void, died on the 3d of January, 1721, and that by his death the King's title to present determined. To this it was said, that the King's right is to present to that turn, and there is no authority whatsoever to shew that this right determines, when the promotee dies; but on the contrary, the constant form of pleading shews, that the law is otherwise: For to entitle the King to a presentation upon an avoidance by cession, it is never set out in pleading, that the promotee is still alive; but this would be absolutely necessary, if the King's title determined by his death. It was therefore prayed, that the judgment of the Court of King's Bench, upon which this writ of error was brought, might be affirmed.

After hearing counsel on this writ of error, a doubt arose, "Whether the writ of error returnable into the Court of King's Bench in *England*, from the Court of King's Bench in *Ireland*, was not abated; the same having been taken out in the life-time of his late Majesty, but not returnable till after his death." And the counsel being directed to withdraw, the following order and judgment was made.

" For

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"FOR that it appears to this House, that the writ of error
"returnable into the King's Bench in *England*, was abated by
"the demise of his said late Majesty, it is hereby ORDERED
"and ADJUDGED, by the Lords Spiritual and Temporal in
"Parliament assembled, that the judgment given in the Court
"of King's Bench in *England* be, and is hereby reversed; and
"that the record be remitted *."

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JUDGMENT
reversed.
Jour. vol. 23.
p. 333.

*In consequence of this determination, the Attorney-general brought a new writ of error, returnable in the Court of King's Bench in *England*; and in Trinity term, 1729, that Court gave the same judgment of reversal, as they had done before. Whereupon, the Archbishop and Mr. *Haley* brought a new writ of error in Parliament; and in support of it, the following additional arguments were offered:

As to the first point, Whether *Drelincourt* having been instituted and inducted to the rectory of *Armagh*, after Dr. *Vigors's* promotion, and enjoyed it till his death, the King could have a right, on account of that promotion, to present another Clerk to the rectory, altho' he had not, or did not present *Drelincourt* to it? It was said, that where the Crown has but a temporary right, as the right by promotion is, the law books agree, that the rule *nullum tempus occurrit Regi*, will not hold: They also agree, that where the King, or a common person, has a right to present to one turn only, if he suffers an incumbent to die in possession of the church, that turn is lost, and he cannot present afterwards. Now it is stated in both the pleas, that *Drelincourt* was at least instituted and inducted to the church of *Armagh*, after Dr. *Vigors's* promotion, and that he died possessed of it, to which the Attorney-general has given no answer. And that which the plaintiffs in error insist upon is, that whether *Drelincourt* was presented or no, yet his institution, induction and enjoyment made him incumbent; and that by his death an end was put to that turn, and consequently to the King's right. That institution and induction will make a man incumbent, appears, because a church never lapses after a Clerk is once instituted to it; and if an incumbent of a church, of the value of 8*l.* per ann. or upwards, be instituted and inducted, or instituted only, to a second church without dispensation, the first church immediately becomes void by cession, whether he was presented to the second or no. That this is evident from the known practice of all the Courts of Common Law, where, when a clergyman sues for any right belonging to his church, they require no more of him to prove himself incumbent, but to shew that he has been instituted and inducted; these being the proper tokens and evidences, by which he is known to the parishioners and others: And therefore the law judges the church full according to these, and not according to the presentation, which is a thing secret and hid from the parishioners and every one else, except the Bishop, and the persons presenting and presented; and were the law otherwise, it is easy to see what absurdities and inconveniencies would unavoidably follow. But it is objected on behalf of the defendant, that *Crane's case*, 6 Co. 29. and *Hunston's case*, 2 Croke 252. are authorities in point to shew, that institution and induction, without presentation, are merely void against a lawful patron. The first of these cases, however, manifestly proves, not that they are merely void even as to the Patron, but only that they are void to one purpose, namely, that he may still present

T. Lutwyche?

D. Ryder.

Case 62. *Hugh Powell, Esq;* - - Plaintiff }
Our Sovereign Lord the King, Defendant } in Error.

3d March, 1728.

IN Hilary term, 1723, an information, in the nature of a *Quo warranto*, was granted by the Court of King's Bench against the plaintiff, for him to shew by what authority he claimed

present to the church, without being put to his writ of right of advowson, or his *quare impedit*; which is perfectly consistent with the church being full to all other purposes. And so this is explained by *Gawdy's case*, *Hob.* 302. where such Clerk is said to be a full incumbent, and may sue for tythes, and the lapse is stopped by him: And the like is laid down in several other cases. As to *Hunston's case*, it relates to an appropriate church, to which the Bishop had no right to institute, and so makes nothing to the present point; there, it is true, that institution and induction, without presentation, are merely void, *i. e.* void not only to the Patron or Appropriator, but to the parishioners also, as appears by that case.

As to the *second* point, Whether the King could have a right to present to the rectory after the death of Dr. *Vigors*, by whose promotion to a bishoprick the vacancy happened? Putting what relates to the institution and induction of *Drelincourt*, quite out of the question, it is apprehended, the Crown could have no right to present to the church of *Armagh*, after the death of Bishop *Vigors*. Because the prerogative of presenting to a church, vacant by the promotion of its incumbent, is not intended to prejudice the Patron's right; for the reason every where given in justification of that Prerogative is, that the King makes the avoidance, and only fills the church again, and so does no more than exchange one life for another, which cannot be considered as any loss to the Patron. This reason holds with regard to those cases which have been adjudged for the Crown, where the person promoted is alive, but fails when he is dead at the time of the King's presentation; because, the avoidance would then have been without the promotion. And this distinguishes the present case, from those of *simony* and *lapse*, and other cases of the like kind, where the fault or neglect of the Patron, is the foundation of the King's right: There the Patron forfeits the turn, and the King gains by his loss; but in the present case, as the Patron commits no fault, so he is supposed to forfeit nothing; and therefore, if the King would fill up the avoidance he has made, he ought to do it so as the Patron may not be prejudiced; and which cannot be, unless he presents before the death of the former incumbent. It is further to be considered, that when the person promoted is dead, the King has the disposal of his bishoprick again; and it is but fit and reasonable, that the effect of the former promotion should cease, when a new one arises: For otherwise, the Crown might have several titles of presentation at one

to be a capital Burgeſs and Common Council-man of the borough of *Brecknock*, and why he claimed all the liberties, privileges and franchises, belonging to the ſaid office of a Capital Burgeſs and Common Council-man of the ſaid borough.
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and the ſame time, ariſing from different and ſucceſſive promotions to the ſame biſhoprick; and after the King had diſpoſed of ſuch benefices as fell in his gift by ſeveral later promotions, he might have a title ſtill ſtanding out and not executed, which fell by a former promotion to that very biſhoprick, even tho' at the diſtance of fifty, or an hundred years: But this is wholly inconſiſtent with the rule of law, *that the King's Prerogatives ſhould be exerciſed in ſuch manner, as not to do an injury to the property of the ſubject*, and which would manifeſtly be the conſequence, if what is now contended for by the defendants ſhould prevail; for if the Crown ſhould reſuſe or neglect to make a formal preſentation for ever, as in this caſe it did for 31 years; and yet permit the benefice to be enjoyed in the ſame manner as if the Crown had preſented, the right of the Patron would be thereby taken away and deſtroyed.

As to the objections made againſt the pleadings, they relate partly to the Archbiſhop's plea, and partly to the plea of the incumbent *Whaley*: The moſt material objection to the Archbiſhop's plea is, that it is inconſiſtent with itſelf; becauſe it firſt admits the Archbiſhop to be Patron of the rectory of *Armagh*, and afterwards derives to *Drelincourt* a title to that rectory, from the grant to him of the Deanery by the Crown. But this is a miſtake; the plea does not derive any title to the rectory to *Drelincourt*, from or under the grant of the Deanery to him, nor does the word *prætextu* in the plea imply any ſuch thing; and if what is therein mentioned concerning the grant of the Deanery be not neceſſary, yet it is but ſurpluſage at worſt, and does not make the plea inconſiſtent: The force of which conſiſts in its ſetting forth, that *Drelincourt* was inſtituted and put in poſſeſſion of the rectory of *Armagh*, and died ſeiſed thereof, which is enough to avoid the King's title. — Againſt the incumbent's plea it is objected, that it confeſſes and avoids the King's title, and alſo traverses it; which is contrary to a known rule in pleading. But the traverse is, *abſq. hoc* that the church remained vacant by the promotion of *Vigers*, and that iſſue took in the whole merits of the caſe; ſuppoſing it however, to be in judgment of law an immaterial traverse, yet that fault is cured by ſeveral late acts of Parliament both in *England* and *Ireland*, which direct the Judges to give judgment according to the very right, without regarding any immaterial traverse, &c. It is further objected to this plea, that the inſtitution and induction of *Drelincourt*, are therein ſet forth only as executions of the Crown's preſentation of him; ſo that if he was not preſented by the Crown, which is ſuppoſed to be confeſſed by the ſubſequent demurrer, he could not of conſequence be inſtituted and inducted on the Crown's preſentation. — Conſequential pleading is vicious, and whatever is affirmed or denied, it ought to be directly and in expreſs words: The inſtitution and induction therefore of *Drelincourt* are paſſed over without notice, and the preſentation of him which (if the now plaintiffs are right upon the point of law) is not neceſſary to the incumbent's plea, is alone traversed in the Attorney-general's replication; and that replication being inſufficient in ſubſtance, nothing is confeſſed by the ſubſequent demurrer. But further, it is not the incumbent's

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To this information the plaintiff pleaded, and in his plea set forth, that the said borough of *Brecon*, alias *Brecknock*, is an ancient borough, known and called as well by the name of the borough of *Brecon*, as by the name of the borough of *Brecknock*; and that the Burgeses of the said borough, time immemorial, unto the 20th day of *March*, in the second and third year of the reign of King *Philip* and Queen *Mary*, were a corporate body, and in divers times known and called by the several names of Burgeses of the town of *Brecon*, Burgeses of the borough of *Brecon*, and Bailiffs and Burgeses of the borough of *Brecon*; and that all the time aforesaid and hitherto, there were and as yet are within the said borough, Burgeses of the said borough who from time to time, and at all times during the time aforesaid and hitherto, were eligible, and were elected out of the most substantial persons, inhabiting as well within as without the said borough. — That King *Philip* and Queen *Mary*, by their letters patent under the Great Seal of *England*, bearing date the said 20th of *March* in the said second and third year of their reign, reciting, among other matters, that their borough of *Brecknock* in *South Wales*, was an ancient incorporated borough, and that the inhabitants thereof and their predecessors inhabitants of the said borough, had enjoyed within the said borough divers liberties, privileges, jurisdictions and customs, which their said subjects then inhabitants of the said town, and their predecessors hitherto had and held; the said King and Queen for themselves, and the heirs and successors of the said Queen,

own title, but his predecessor *Drelincourt's* which the incumbent pleaded in manner aforesaid. It was sufficient for the present incumbent to shew, that *Drelincourt* was Rector of the church of *Armagh* since the promotion of *Vigors*, and that he died so; but whether he had an indefeazable title to it, or how he came into it, did not concern the incumbent; nor could he so well know his predecessor's title as his own, or be supposed to plead it so well, being in fact a stranger to it. And it was conceived, that hardly any thing had been objected in the whole of this cause with any shew of strength, but what had arisen from not distinguishing between the several titles of the present incumbent *Whaley*, and of *Drelincourt* the last incumbent.

The Attorney-general on the part of the Crown, rested his case upon the reasons and arguments urged on the former writ of error.

JUDGMENT
reversed.
Jour. vol. 23.
P. 545.

BUT, after hearing counsel on the present writ upon the 23d of *April*, 1730, and the Judges being heard upon certain questions to them proposed, and after due consideration and debate, it was ORDERED and ADJUDGED, that the judgment given in the Court of King's Bench in *England*, reversing a judgment of the Court of King's Bench in *Ireland*, should be reversed; and that the said judgment given in the Court of King's Bench in *Ireland*, should be affirmed.

did

did order, constitute and grant, that the said borough of *Brecon* should be and remain always for the future a borough of itself, and that the Burgeses of the said borough from thenceforth always for the future, should be and remain one corporate and politic body, by the name of Bailiff, Aldermen and Burgeses of the borough of *Brecon*; and that there should be in the said borough, one Bailiff and two Aldermen, and fifteen men of the most substantial and most discreet Burgeses of the said borough, (whereof the said Bailiff and two Aldermen to be three) who should be called and named Capital Burgeses and Counsellors of the said borough, and who from thenceforth should be a Common Council of the said borough; and from time to time should be aiding and assisting to the Bailiff and Aldermen of the said borough for the time being, in all matters and causes touching or concerning the said borough. And the said King and Queen did further order, that whensoever it should happen that any of the said fifteen Capital Burgeses or Counsellors of the said borough for the time being should die, or be removed from their said places, that then and so often it should be lawful for the other remaining and surviving Capital Burgeses and Counsellors, or the major part of them, to nominate and elect other or others out of the Burgeses of the said borough, into the place and office of those Capital Burgeses or Counsellors so happening to die or be removed; and that he or they being so elected and chosen, and having taken his or their corporal oath before the Mayor and Aldermen of the said borough, well and faithfully to execute the said office, should be of the number of the said fifteen Capital Burgeses or Counsellors of the said borough: And the said King and Queen did further grant unto the said Bailiff, Aldermen and Burgeses of the said borough, and their successors, all other lawful liberties and franchises which the Burgeses had before enjoyed under any name of incorporation, by virtue of any letters patent of the said King and Queen, or any of their predecessors, or by any other lawful right, custom, prescription, or title. — That on the 27th of *September*, 1708, the plaintiff being one of the Burgeses of the said borough, duly elected and chosen, was at the said borough on the said 27th day of *September*, by the major part of the Capital Burgeses and Counsellors of the said borough, being duly assembled, duly elected and chosen into the place and office of a Capital Burges and Counsellor of the said borough, being then vacant, and being so elected and chosen

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chosen as aforesaid, he took his corporal oath before the Bailiff and Aldermen of the said borough, well and faithfully to execute the said office, and was thereupon admitted therein; and by reason thereof, became one of the Capital Burgeses and Counsellors of the said borough, and that by that authority he had from the time mentioned in the information claimed, used and exercised the said office, together with all the liberties and privileges thereunto belonging.

To this plea, the King's Coroner replied; and alledging by *protestando*, that the Burgeses were not to be chosen out of persons not inhabiting within the borough; took an issue, that the plaintiff was not sworn a Capital Burgess, as he had alledged in his plea. The replication then admitted the several clauses in the charter as stated in the plea; and stated another clause, that no inhabitant should claim any liberties or franchises within the borough, unless he was continually resident and conversant within the borough. And after averting, that the office of a free Citizen and Burgess were the same; said, that the plaintiff never was an inhabitant of the said borough, and traversed that he was a Burgess of the said borough, at the time of his being elected a Capital Burgess. To this the plaintiff rejoined and took an issue, that he was a Burgess of the said borough at the time of his election into the office of a Capital Burgess.

These issues were tried before Mr. Justice Price, at Hereford assizes in March, 1724; and the Jury upon the trial found a special verdict, stating, — That the borough of Brecknock is an ancient borough, and anciently known as well by the name of the borough of Brecon, as by the name of the borough of Brecknock, and that the borough of Brecon and the borough of Brecknock are one and the same borough: And then finding the several clauses in the charter stated in the plea and replication, and the following other clauses, *viz.* that the Common Council should have power to make by-laws for governing the Bailiff, Aldermen and Capital Burgeses, and the Burgeses, artificers and inhabitants of the said borough. — That the Burgeses, their heirs and successors, should be free from toll. — That the Burgeses of the borough, inhabiting within the borough and town or suburbs, should not be put in any assizes or juries, with foreigners, nor foreigners with them. — That the Bur-

gesſes of the borough or town, ſhould not be compelled to go out of the town before any Juſtices of Aſſize, or Oyer and Terminer, or other Juſtices, except the Chief Juſtice of Brecknock.

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The jury then found, that the place and office of a Freeman of the ſaid borough, and the place and office of a Burgeſs of the ſaid borough, are one and the ſame office and not different; and that from the making and granting of the ſaid letters patent, the oath hereafter mentioned, intituled the oath of a Burgeſs or Freeman within the town of *Brecknock*, “*First*, You ſhall ſwear that from henceforth you ſhall bear faith and true allegiance to the King’s Maſteſty that now is, his heirs and lawful ſucceſſors; you ſhall be obedient to the Bailiff, Recorder and Aldermen of this town, in all their lawful commandments; this town, and the franchiſes and lawful cuſtoms you ſhall maintain, ſave and keep harmleſs, to your power and induſtry; you ſhall be contributing to all manner of charges within this town, as ſummons, watches, contributions, taxes, tallages, lot and ſcot, and all other charges, bearing your part as a Burgeſs and Freeman ought to do; you ſhall know no foreigner to buy or ſell any kind of merchandize, with any other foreigner within this town, or the franchiſes thereof, contrary to the ſtatute againſt foreſtalling, regrating and ingroſſing, but you ſhall warn the Bailiff, Aldermen and Chamberlains of the ſaid town thereof without delay; you ſhall take no apprentice but ſuch as you may juſtify by the laws of this realm of *England*, and for no leſs term than for ſeven years; you ſhall keep the King’s Maſteſty’s peace within the ſaid town to the beſt of your power; you ſhall preſently repair with your ſtaff, ſallet, or other weapon, to the officers of this town, upon the ringing of a bell, or other notice given unto you for that purpoſe, when any fray, or other outrage is made, committed, or offered or like to be made, committed, or offered againſt the peace; and do your endeavour with the ſaid officers to appeaſe the ſame, and to apprehend all felons, murtherers and traitors: And in all other things behave yourſelf as a true and lawful Burgeſs ought to do. So help you God;” was taken by every common perſon admitted into the place or office of a Burgeſs, or Freeman of the ſaid town: And that the following clauſe or paragraph only, *viz.* “*First*, You ſhall ſwear, that from henceforth you ſhall bear faith and true allegiance to the King’s Maſteſty that now is, his heirs and lawful ſucceſſors; you

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“shall be obedient to the Bailiff, Recorder and Aldermen of this town, in all their lawful commandments: This town and the franchises and lawful customs you shall maintain; save and keep harmless to your power and industry, and in all other things behave yourself as a true and lawful Burgefs ought to do. So help you God;” and no other part of the said oath, was, throughout the time aforesaid, taken by every Gentleman admitted into the place or office of a Burgefs, or Freeman of the said borough. And the jury further found, that the said *Hugh Powell*, being a Gentleman, on the 29th day of September, in the 6th year of the reign of *Queen Ann*, and long before and continually afterwards, lived at *Castlemadock*, in the hundred of *Mirtbir*, four miles from the said borough, and out of the said borough. And that the said *Hugh* living in *Castlemadock* aforesaid, on the said 29th day of September, in the said 6th year of the reign of *Queen Ann*, was chosen by the then Bailiff, Aldermen and Common Council of the said borough, duly assembled, into the place and office of a Freeman, or Burgefs of the said borough of *Brecon*. That on the 21st day of May, 1708, at the borough aforesaid, before the then Bailiff, Aldermen and Common Council of the said borough, being duly assembled, he took the clause or paragraph of the said oath, intituled, “The oath of a Burgefs or Freeman,” before mentioned, which was usually administered to Gentlemen in manner and form aforesaid; and that he was thereupon admitted to be a Burgefs of the said borough. That the said *Hugh Powell* on the 27th day of September, 1708, aforesaid, at a chamber held at the said borough, in and for the said borough, by the Bailiff, Aldermen, and major part of the Capital Burgefses and Counsellors of the said borough, then and there being duly assembled, was named and elected into the place of a Capital Burgefs, or Counsellor of the said borough; and that he took his oath before the Bailiff and Aldermen of the said borough, for the due execution of the office of a Capital Burgefs of the said borough, and thereupon was admitted into the said office: That the said *Hugh Powell* after that time, in two several years, was twice elected, chosen and sworn into the office of Bailiff of the said borough of *Brecon*, and throughout the said years respectively, exercised the said office of Bailiff of the said borough. That from the 15th year of the reign of *Queen Elizabeth*, and continually hitherto without interruption, it was usual within the said borough, to elect, nominate and choose Freeman or Burgefses to

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should be drawn into question, whether he, or any other person

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of the said borough, out of men inhabiting as well without, as within the said borough; and that such persons inhabiting without the said borough, and being elected and chosen into the said place or office of a Burgefs of the said borough, throughout the whole time aforesaid, did exercise the aforesaid place and office of a Burgefs of the said borough: But upon the whole, the jury submitted it to the judgment of the Court, whether the said *Hugh Powell*, at the time of his being elected into the office of a Capital Burgefs, was a Burgefs or not.

This special verdict being argued before the Court of King's Bench, in *Michaelmas* term, 1727, the Court were pleased to give judgment of *ouster* against the plaintiff in error; and that the relator should recover costs against him, according to the statute of the 9th of *Queen Ann*.

To reverse this judgment, the plaintiff brought a writ of error in Parliament; and on his behalf it was insisted to be erroneous, because the first issue was plainly found for him; namely, "that he was duly sworn a capital Burgefs." And as to the second issue, "Whether he was a Burgefs at the time of his being elected a capital Burgefs or not;" it appeared, that he was chosen a Burgefs on the 29th of *September*, 1707; that he was afterwards sworn a Burgefs on the 21st of *May*, 1708; that on the 27th of *September* following, he was chosen, sworn and admitted a capital Burgefs; and that since that time, he had been twice chosen and sworn Bailiff of the said borough, and executed that office two several years. It likewise appeared, that this was a corporation by prescription, as well as by charter; that the charter confirmed all their ancient customs, &c. and that from the 15th of *Eliz.* down to the present time, without interruption, it had been usual to elect Freemen or Burgefses out of persons inhabiting, as well without as within the borough, who had accordingly enjoyed that office. It was therefore conceived to be of dangerous consequence to set aside such an usage, after so great a length of time; and more especially, as it might be the cause of disfranchising many other members of the corporation, who had been chosen in the same manner, or whose elections depended on the same usage; and it might also tend to destroy the whole body, if, after the plaintiff had been twenty years in possession of the superior office of a capital Burgefs, and had twice served the office of Bailiff, it should be drawn into question, whether he, or any other person

P. Yorke.

J. Willes.

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T. Reeve.
N. Fazaker-
ley.

person under the like circumstances, was a legal Burgeſs at the time of ſuch election into the office of capital Burgeſs.

On the other ſide, it was ſaid, that the only queſtion in this caſe was, whether the plaintiff in error was a Burgeſs, at the time of his pretended election to be a capital Burgeſs, or not? If he was not, he was incapable of being elected a capital Burgeſs; the charter having directed the choice of ſuch officers to be out of the Burgeſſes. Since the acceptance of this charter, no one can be a Burgeſs, unleſs his election into that office is warranted by the charter: Now it plainly appears, that the plaintiff was not capable of being a Burgeſs, not being an inhabitant of the borough, which is a neceſſary qualification for it is expreſſly required by the charter, that the Burgeſſes ſhall be choſen out of the inhabitants of the borough.—But it is objected, that notwithſtanding the words of the charter are ſo, yet, that the uſage has been to elect Burgeſſes who live out of the borough. No uſage can be ſufficient to eſtabliſh a right, but an immemorial uſage, which does not appear in the preſent caſe, this uſage being only from the 15th of *Eliz.*; and therefore not ſufficient to eſtabliſh a right. Suppoſing, however, that this could be taken to be ſuch an uſage, as would amount to a preſcription; yet, when a charter has been accepted, directing an election inconſiſtent with ſuch an uſage, as in the preſent caſe, where the election of Burgeſſes is confined to be out of the inhabitants, the preſcription inconſiſtent with the charter can no longer ſubſiſt, but is determined by the acceptance of the charter; which muſt afterwards be the only meaſure, by which the election of Burgeſſes is to be governed. Corporations are merely creatures of the Crown, and where they ſubſiſt under charters, they muſt be guided and governed by ſuch rules and directions as are thereby preſcribed; and therefore, where any charter has directed, as in the preſent caſe, that certain members are to be elected out of perſons under any particular deſcription, ſuch perſons and no others are capable of being elected. Tho' in ſome corporations, practices inconſiſtent with the rules preſcribed by the charters may have long prevailed, yet they are no better than ſo many inſtances of uſurpation upon the Crown; and ſuch a wrongful practice can no more create a right, contrary to the words or directions of a charter, than the firſt inſtance of that kind after the acceptance of the charter, could be legal; ſince it would be difficult

to maintain that the first election, after the acceptance of a charter, of a person not within the description of it was legal; and if not, it would be equally difficult to fix upon any period of time, when such a practice would first begin to be legal. It was therefore prayed, that the judgment of the Court of King's Bench might be affirmed.

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ACCORDINGLY, after hearing counsel on this writ of error, it was ORDERED and ADJUDGED, that the judgment given in the Court of King's Bench should be affirmed; and that the record should be remitted, to the end execution might be had thereupon, as if no such writ of error had been brought into the House.

JUDGMENT affirmed. Jour. vol. 23. P. 339.

John Brome, Esq; and Elizabeth his } Appellants.
Wife, - - - - - }

Case 63.

Henry Berkley, George Berkley and Harry } Respondents.
Cole, Esqrs. - - - - - }

5th March, 1728.

BY indentures of lease and release, dated the 17th and 18th of February, 1689, between George Earl of Berkley and Elizabeth Countess of Berkley, his wife, of the first part, the Lady Arabella Berkley, their daughter, of the second part, Dr. John Tillotson and Robert Nelson, Esq; of the third part, Sir James Hayes and Martin Folkes, Esq; of the fourth part, William Smith, Esq; and the respondent Harry Cole of the fifth part, Dr. George Berkley, son of the said Earl and Countess, of the sixth part, and Ann Cole, widow, and Jane Cole, her daughter, of the seventh part; reciting, *inter alia*, that the manor, lands, &c. therein after mentioned, had been conveyed to the Lady Arabella Berkley and her heirs, as security for 2000*l.* and interest, redeemable by the Earl and his heirs; and that the said John Tillotson and Robert Nelson were seized of the equity of redemption of the said premises, for such uses and trusts, as the said Elizabeth, Countess of Berkley, whether sole or covert, by any deed or writing under her hand and seal, testified by three or more credible witnesses, should, from time to time, appoint; and farther reciting, that a marriage was shortly

2 Wms. 484.
Viner, vol. 16.
p. 437. note to
ca. 10.
1 Eq. ca. ab.
p. 340. ca. 7.
by the name of
Brown v.
Berkley.
2 Eq. ca. ab.
p. 657. note
to ca. 11.

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intended to be had between the said *George Berkley* and *Jane Cole*, in consideration thereof and of 2000*l.* being the marriage portion of the said *Jane*, paid by her mother to the Lady *Arabella Berkley*, and for providing a competent jointure for the said *Jane*, and for settling the premises to the uses therein after mentioned; the said Earl and Countess, together with the Lady *Arabella*, Dr. *Tillotson* and *Robert Nelson* conveyed to the said *James Hayes* and *Martin Folkes* and their heirs, the manor and rectory of *Lakenham*, &c. in the county of *Norfolk*, to the use of the said *George Berkley* for his life, without impeachment of waste; and after the determination of that estate, to the use of the said *William Smith* and *Harry Cole* and their heirs, for the life of the said *George Berkley*, upon trust to preserve the contingent uses; and after the decease of the said *George Berkley*, to the use of the said *Jane Cole* for her life, for her jointure, and in bar of dower; and after her death, to the use of the first and every other son and sons of the said *George*, on the body of the said *Jane* lawfully issuing, in tail general; and in default of such issue, (after a proper limitation to trustees, for the use of any son or sons, wherewith the said *Jane* might be content at the decease of the said *George Berkley*), to the use of the said *William Smith* and *Harry Cole*, and their heirs for ever; upon this trust, that in case the said *George Berkley* should have no son or sons of the body of the said *Jane Cole* begotten, or having one or more son or sons of her body begotten, such son or sons should all die under the age of 21 years without issue, and there should be one or more daughter or daughters of the said *George Berkley*, on the body of the said *Jane Cole*; then that the said *William Smith* and *Harry Cole*, and the survivor of them and his heirs, by and out of the rents, issues and profits of the said manor and premises, or by absolute sale, or leasing of the same, or any part thereof, or otherwise as they in their discretion should think fit, should raise for such daughter, if but one, the sum of 2500*l.* for her portion, and pay the same to such only daughter at her age of 21 years, or day of marriage, which should first happen; and also raise for and pay to such only daughter, the yearly sum of 100*l.* for her maintenance and education, until her said portion should grow due; the said yearly sum of 100*l.* to be paid to such daughter by half yearly payments, viz. *Christmas* and *St. John Baptist*, by equal portions, the first payment thereof to begin and be made at

at the first of those feasts next coming or happening, after the estate so limited to the said William Smith and Harry Cole, and their heirs, should take effect in possession; and if there should be two such daughters, and no more, then in trust to raise 2500*l.* for their portions, to be equally divided between them, and to be paid them at their respective ages of 21, or days of marriage, which should first happen; and to pay them 60*l.* yearly a-piece, in like manner by half yearly payments, for their maintenance and education, until their portions should grow due; the first payment to begin and be made at the first of the said feasts next coming or happening, after the said estate limited to the said Smith and Cole should take effect in possession; and if there should be three daughters, in trust to raise 3000*l.* to be equally divided between them, and to pay them yearly 50*l.* a-piece in like manner, and to commence at the like time, for their respective maintenances and education, until their respective portions should grow due; and in case there should be more such daughters than three, upon this further trust, that they the said William Smith and Harry Cole, and the survivor of them and his heirs, should stand and be seised of the said manor, lands, &c. in trust for the benefit of all and every the daughters of the said George Berkley, on the body of the said Jane Cole to be begotten, equally to be divided amongst them, to take as tenants in common, and not as joint tenants of the said trust, and of their several and respective heirs and assigns for ever: But in case the said George Berkley should have no daughters by the said Jane Cole, then upon trust for the benefit of the issue of the said George Berkley, on any other wife, as therein mentioned; and in case of no issue by a second marriage of the said George Berkley, then in trust for the benefit of such persons, and for such estates and uses, as the said Elizabeth, Countess of Berkley, notwithstanding her coverture, should, by deed or will, testified by three or more witnesses, direct; and in default of such direction, in trust for the Earl and Countess, and the survivor of them, and the heirs and assigns of the Countess for ever.

By a memorandum indorsed on the said deed of settlement, before the execution thereof, a power was given to Dr. Berkley, in case he left no issue, to charge the premises, from the decease of the said Jane, his intended wife, with any sum not exceeding 2000*l.* for such uses as he thought fit to appoint; and

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and that after such charge, the said *Smith* and *Cole* and their heirs should stand seised of the said premises, after the decease of the said *Jane*, and not before, in trust for the raising and paying the same.

The marriage took effect, and on the 15th of *October*, 1694, Dr. *George Berkley* died, leaving issue by the said *Jane Cole*, who survived him, only one daughter, *Elizabeth*.

Elizabeth, Countess of *Berkley*, by her will, dated the 26th of *August*, 1706, after taking notice that the said premises were in jointure to her daughter in law, late wife of her son *George Berkley*, and were charged with 2500*l.* for the portion of her granddaughter *Elizabeth Berkley*; devised the reversion, remainder and equity of redemption in the same, to her son *Charles*, Earl of *Berkley*, and his heirs, on condition that he paid a debt of 500*l.* owing on bond, and all her other debts.

Earl *Charles*, by his will, dated the 9th of *March*, 1708, devised the premises, expectant upon the death of Mrs. *Chaplain*, the mother of *Elizabeth*, and all his interest therein, unto *George Berkley* his son, and the heirs of his body begotten; with remainder to the respondent *George Berkley* in like manner, remainder in fee to the testator's grandson *William Chamber*, Esq.

On the 22d of *March*, 1712, the said *Elizabeth Berkley* attained her age of 21, and in *April*, 1717, married the appellant *John Brome*.

In *Trinity* term, 1725, the appellants exhibited their bill in Chancery against the respondents and the said *William Chamber*, setting forth several of the facts before mentioned, and that the appellant *Elizabeth*, from the time she attained her age of 21, became well entitled to have the 2500*l.* raised; but that *Cole*, the surviving trustee, refused to raise the same, and alledged he had no authority so to do, till the death of the appellant's mother; whereas the appellants insisted, that 2500*l.* was directed to be raised and paid at the appellant *Elizabeth's* age of 21, or marriage, which should first happen, and that the reversion of the premises ought to be sold for the payment thereof, with interest from the time it became payable. The appellants likewise set forth, that the respondents *Henry* and *George Berkley*,

Berkley and *William Chamber*, claiming title to the premises under the wills of the Countess of *Berkley* and Earl *Charles*, had got into their custody the said deed of settlement and other the title deeds of the premises, and concealed the same, to disappoint the appellants from having an execution of the said trust; and therefore, and in regard the appellant *Elizabeth* had no other provision, they prayed, that the respondent *Cole* might be compelled to act in the trust, and that the other respondents might set out their title to the premises, and that the reversion thereof, expectant on the death of the appellant *Elizabeth's* mother, might be decreed to be sold, for payment of the said 2500*l.* portion due at the appellant's age of 21, and all interest for the same.

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The respondents *Henry* and *George Berkley*, by their answers to this bill, alledged, that the reversion of the premises, expectant on the death of the appellant *Elizabeth's* mother, was devised by the will of their grandmother *Elizabeth*, Countess of *Berkley*, to their late father *Charles*, Earl of *Berkley*, in fee; and by his will, to the said *Henry Berkley* and the heirs of his body, with remainder to the said *George Berkley* and the heirs of his body, remainder in fee to the said *William Chamber*; and insisted, that according to the true intent and meaning of the said indenture of release, the 2500*l.* ought not to be raised, till after the decease both of the said *George Berkley* and *Jane* his wife; and that till then, the trust estate could not take effect in possession, and that no interest ought to be paid for the 2500*l.* until after the decease of the appellant's mother; they also insisted, that the appellant *Elizabeth* had other provision, besides what was made by the settlement, and which fact was afterwards fully proved in the cause.

On the 10th of *May*, 1727, the cause was heard before the Lord Chancellor *King*, who directed a copy of the limitations in the deed of settlement, and of the memorandum indorsed thereon, and also a copy of an order in a certain cause between *Sandys* and *Sandys*, to be laid before him to consider thereon; and declared, that he would desire the assistance of his Honour the Master of the Rolls.

These copies, together with some other precedents, were accordingly laid before the Lord Chancellor and the Master of

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the Rolls; and on the 13th of November, 1728, the cause came on for judgment, when his Lordship, assisted by his Honour, was pleased to declare, that the appellants came too soon to have this portion raised, and that there appearing no cause to give them any relief, the bill should stand dismissed.

C. Talbot.

T. Lutwyche.

From this decree, the appellants thought fit to appeal; insisting, that their application to have the 2500*l.* raised and paid by a sale of the reversion of the premises, was not too early; but that the same ought to have been decreed to be so raised, subject to the estate for life of the jointress, with interest from the time that it became payable by the settlement, and that the appellants ought also to have had their costs of suit. And in support of this relief it was argued, that the words of the settlement were plain and positive as to this particular of raising the portion, *viz.* that in case *George Berkley* should have no son of the marriage, the trustees, in whom the reversion in fee, subject to the jointure, was vested, should raise 2500*l.* for an only daughter, and should pay the same to her at her age of 21, or marriage, which should first happen; without restraining it to be done till after the death of the mother. That it was highly reasonable, that this provision in the settlement should have its full force and effect, because the appellant *Elizabeth*, who was the only issue of the marriage, claimed as a purchaser for a valuable consideration, under a settlement made in consideration of marriage and of a portion paid; whereas the respondents claimed only under a voluntary disposition, and subject to the portion. That if there had been more than three daughters, the whole reversion in fee would have been vested in those daughters, and as a provision for them, and to be at their disposal; in which case, if the appellant *Elizabeth* had had three sisters, she would have had a fourth part of this reversion in her immediate disposal, even in the mother's life-time; whereas now, tho' she was the sole issue of the marriage, she was to have no portion or provision during the mother's life, if the construction contended for should prevail. The objection is, that by the settlement, the trustees, until the portions should be payable, were to raise 100*l.* *per ann.* for the maintenance of an only daughter, payable at *Christmas* and *Midsummer*, the first payment to be made at the first of the said feasts next coming, after the said estates so limited to the trustees, should take effect in possession, which was not to be till after the mother's death; and that

as the maintenance is to be paid before, and until the portion is payable, this shewed the intent of the parties to be, that the portion of 2500 L. also was not to be raised till after her death. But to this it was answered, that the reason of making that provision in relation to the maintenance was, because the annual rents and profits are the proper fund for an annual maintenance; and as those rents and profits were limited to the appellant *Elizabeth's* mother for her life, and could not, during her life, be received by the trustees, and as it might be inconvenient to raise a maintenance by sales or mortgages to be made every half year; the parties to the settlement had therefore expressly guarded against that inconvenience, by postponing the commencement of those half yearly payments for maintenance, till after the mother's death. But there are many instances, where portions have been raised by sale of reversions, in the life-time of the tenant for life; and the inconvenience on the other side would be very great, if a daughter's portion should not be raised when she most wants it, either upon her attaining her age of 21, or for her advancement in marriage; and therefore in this settlement, there was no provision which postponed the raising of the portion, longer than the time appointed for the payment of it. That as the settlement had made a difference between the two cases, founded upon different reasons, it did not follow from the postponing of the maintenance till after the death of the mother, that the portion should not be raised, if it became payable, as in fact it did, during her life; nor was the provision for maintenance thereby rendered ineffectual, since it might have happened, that both the father and mother had died, before the appellant *Elizabeth* had either attained 21, or been married; in which case, this provision for maintenance would have taken place; but which, in the present case, it could not do, according to any construction of the settlement, and therefore no argument could be drawn from the provision about maintenance, for delaying the raising of the portion. Besides, there are several precedents in the Courts of Equity, of decrees for the sale of reversionary estates for payment of portions, some of which, at least, come up to the circumstances of this case, if they are not stronger.

On the other side it was contended, that the sale of reversionary terms for raising portions for children in the life-time of the father, or of a jointress, is of pernicious consequence to estates

P. Yorke.

J. Willes.

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estates and families, and therefore the Court of Chancery avoids it as much as possible; and never decrees it to be done, unless where it appears clearly to have been the intention of the parties to the settlement. That in the present case, the intent of the parties appeared to the contrary; for it was expressly appointed by this settlement, that the 100*l.* *per ann.* for maintenance should not commence, till the first of the feast days next after the estate limited to the trustees should take effect in possession, which was not till after the death of the jointress. That the payment of the maintenance or interest was not to commence, until after the estate took effect in possession, and to continue until the portion should grow due to be paid; and the time of the portion's growing due, being plainly, in the apprehension of the parties, subsequent to the commencement of the maintenance or interest, the deed ought not to be so construed, as that the portion should be absolutely payable at the age of 21, notwithstanding the estate for life of the jointress continued, when the maintenance or interest was not to commence, until the determination of that estate for life. That Earl *Charles*, by paying the debts of the Countess, might be considered as a purchaser of the reversion for a valuable consideration; but if the sale prayed by the bill should be made, his devisees, who were his children, would have very little, if any, benefit from the reversion; it not being, at present, worth much more to be sold than the 2500*l.* and the interest of it. And lastly, that there was no room in this case for an argument, which had been sometimes urged, that the portion ought to be raised, in order that the appellant *Elizabeth* might be advanced in marriage; for she had been many years married, and had a considerable provision besides the portion now in dispute.

DECREE
affirmed,
Jour. vol. 23
p. 350.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

Charlotte

Charlotte, Marchioness Dowager of *Annandale*, and her two Sons, Lord *George Johnston* and Lord *John Johnston*, Infants, } Appellants. Case 64.

Ann Harris, Respondent.

19th March, 1728.

THE respondent was the daughter of *Edward Harris*, formerly Governor of the isle of *Jersey*, who brought her up in a genteel, sober and regular manner; but being afterwards greatly reduced by misfortunes, he left her at his death very young and in a helpless condition. <sup>2 Wms. 432.
1 Eq. ab. 87.
ca. 6.</sup>

In May, 1717. *William*, Marquis of *Annandale*, applied to the respondent to become his housekeeper; which, considering her narrow circumstances, she was the more easily prevailed upon to accept, and for sometime behaved herself well and virtuously; but was at length prevailed upon by the Marquis to cohabit with him.

The respondent afterwards proving with child, and the Marquis being very desirous to make some provision for the support and maintenance of the respondent and such child, when the same should be born, and for the longer liver of them; did, of his own free will and offer, procure to be prepared, and on the 15th of September, 1718, executed a bond to the respondent in the penalty of 4000*l.* conditioned for the heirs, executors, or administrators of the Marquis, paying to the respondent 2000*l.* within one month after his death.

And on the same day, the Marquis and the respondent mutually executed a deed or instrument, whereby, after reciting the said bond, the Marquis declared, that as well for divers good causes and considerations, as for and in consideration of the love and affection which he bore to the respondent, and a child already begot by him on her body; and for a provision or maintenance for the respondent and such child, after the death of him the said Marquis; he did fully, freely and absolutely give, grant

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grant and confirm, unto the respondent the sum of 2000*l.* so secured by the said recited bond, to be paid to the respondent out of the personal estate, goods and chattels of him the said Marquis; to have and to hold the aforesaid sum of 2000*l.* unto the respondent, after the death of the said Marquis from thenceforth for ever, without any manner of claim, challenge, or demand, of or by any other person or persons whatsoever, but to the several uses, intents and purposes after mentioned; viz. that the said sum of 2000*l.* should be placed and laid out on an annuity or yearly income, to and for the only proper use and benefit of the respondent and the child begot by him the said Marquis on her body as aforesaid; and to be paid to them during the life of the respondent and the said child, or the longest liver of them.

On the 15th of *November*, 1718, the respondent was brought to bed of a female child by the Marquis; but which died on the 17th of *December* following.

On the 14th of *January*, 1720, the Marquis died, having made his will, and thereby appointed the appellant the Marchioness his executrix; and directed, that she should pay out of his personal estate, all his lawful executory and personal debts, in which Lord *Johnston* his eldest son was not bound, and which were contracted since the 1st of *April*, 1690.

The appellant the Marchioness, soon after the death of the Marquis, proved the will in the Prerogative Court of *Canterbury*, and possessed herself of his personal estate to the amount of about 6000*l.*

The respondent soon after the death of the Marquis, made her application to be paid the money due to her; but the appellant refusing to pay the same, an action was brought upon the bond; whereupon in *Michaelmas* term, 1721, the appellant exhibited her bill in Chancery against the respondent, praying a discovery of the said bond and deed, and in whose presence, upon what inducements, and for what considerations the same were executed; and an injunction to stay the respondent's proceedings at law on the bond.

To this bill the respondent put in her answer, setting forth the matters aforesaid, and the said bond and deed, and that the

same

Cases in Parliament.

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same were given for the considerations aforesaid without any fraud or circumvention; that the Marquis himself procured such bond and deed to be drawn, and that the respondent knew not who prepared the same.

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The respondent proceeded to trial in her action; but the appellant the Marchioness having pleaded *non est factum*, and one of the witnesses being dead, and the other in Scotland, the respondent could not prove the execution of the bond, and was therefore nonsuited.

But in October, 1723, she filed her bill in Chancery against the appellants, setting forth the matters aforesaid, and praying a discovery of the late Marquis's assets, and to be thereout paid the 2000*l.* and interest.

The appellants put in their answer to this bill, setting forth the Marquis's will, and an account of his personal estate come to the hands of the appellant the Marchioness, and the payments she had made thereout; and admitted, that upon inspecting the deed and bond, she apprehended the subscription thereto to be like the Marquis's writing.

Issue being joined, several witnesses were examined on both sides; and on the 25th of January, 1727, both causes came on to be heard before the Lord Chancellor King; when his Lordship declared he saw no cause to give the plaintiffs in the original cause any relief, and therefore ordered the original bill to be dismissed, with costs to be paid out of assets: And in the cross cause it was ordered and decreed, that it should be referred to the Master to take an account of what was due for principal and interest on the said deed of the 15th of September, 1718, from the end of one month after the death of the said late Marquis of Annandale; and also of the assets of the said late Marquis, which had come to the hands of the appellant the Marchioness, or any other person or persons on her behalf; and what the Master should find and certify to be due to the respondent for principal and interest as aforesaid, and for her costs in the cross cause, the appellant the Marchioness was decreed to pay to the respondent out of assets, in a course of administration.

On

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On the 10th of *December*, 1728, the Master made his report, and thereby certified, that 2854*l.* 10*s.* would on the 14th of *January*, 1728, be coming due to the respondent for principal money, interest and costs, pursuant to the decree; and that the appellant, after the death of the Marquis, did possess herself of his personal estate, amounting to 5609*l.* 6*s.* 2*d.* out of which she had paid 733*l.* 18*s.* 2*d.* so that there remained in the appellant's hands 4875*l.* 8*s.* out of which she was to pay the before mentioned sum of 2854*l.* 10*s.* to the respondent, according to the decree.

P. Yorke.

C. Talbot.

The appellants apprehending this decree to be erroneous, appealed from it; and on their behalf it was insisted, that the respondent's demand as well by her cross bill, as in her action at law, was founded on the bond; in the proof of the execution whereof, she had failed both at law and in equity. That the deed on which the decree was founded, appeared to bear even date with the bond, to which there were two witnesses, and yet the deed was attested by one of those witnesses only, which rendered the execution of it suspicious; and even the proof of such execution, depended on the proof of the hand-writing of that single witness, who was now dead. That in this case, no assistance ought to be given in a Court of Equity, in favour of a demand for so large a sum of money, and founded on such a consideration; and in regard it was also in proof, that the respondent came into the late Marquis's family in a very low and mean condition, and afterwards made several considerable advantages to herself. That if this decree should stand, the appellant the Marchioness would be liable to make satisfaction to the respondent out of her own estate, for so much as the assets of the Marquis, remaining unadministered, should fall short of the principal and interest claimed to be due on the deed; altho' she had applied the assets already administered in satisfaction of the funeral expences and just debts of the Marquis, most of which debts were due on simple contract only. And that many of the unsatisfied creditors might be disappointed, and the appellants the infants would be totally deprived of the provision intended for them by their father's will, and left without any manner of provision for their maintenance or education from him: And therefore it was prayed, that the decree might be reversed, and the respondent's bill dismissed with costs.

On

On the other side it was only said, that the execution of the deed was duly proved, and that the Marquis's subscription thereto was proved to be of his hand-writing; and therefore, and as the appellant the Marchioness had assets in her hands more than sufficient to satisfy the respondent's just demand; it was hoped, that the decree would be affirmed, and the appeal dismissed with costs.

1729.

T. Lutwyche.
W. Hamilton.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

DECREE
affirmed.
Jour. vol. 23.
p. 367.

Mary Danson Widow of John Danson, Esq; } Appellant.

Case 65.

Nicholas Trott and Ann his Wife, Elizabeth Moor, Widow, Henry Bertie, Esq; James Bertie, Esq; and Hugh Watson, Gent. } Respondents.

27th March, 1729.

KING Charles II. by several letters patent of the 24th of March, in the 15th year of his reign, and the 30th of June, in the 17th year of his reign, granted and confirmed the province of Carolina in America, with several powers and privileges, to Edward Earl of Clarendon, George Duke of Albemarle, William Earl of Craven, John Lord Berkley, Anthony Lord Ashley, Sir George Carteret, Knt. afterwards Lord Carteret, Sir William Berkley, Knt. and Sir John Colleton, Bart. and their heirs: Soon after which the patentees, by several deeds, agreed to hold the same as tenants in common.

1 Wms. 780.
Viner, vol. 21.
p. 521. ca. 13.
Reported by
the name of
Trott v.
Dawson.

Sir William Berkley died in 1682, having first by will devised his 8th part of the said province, to Dame Frances his wife in fee; who having afterwards married Philip Ludwell, Esq; they agreed to sell the same to Christopher then Duke of Albemarle, the then Lord Carteret, the Earl of Craven, and Sir Peter Col-



leton, four of the then Lords proprietors, for 300*l.*; who made use of the name of *Thomas Amy*, citizen and grocer of *London*, as their trustee in such purchase: And accordingly, by indentures dated the 10th and 11th of *April*, 1684, *Ludwell* and his wife, in consideration of 300*l.* really paid by the *cestuique* trusts, tho' mentioned in the release to be paid by *Amy*, conveyed the said proprietorship to *Amy* in fee.

The equitable estate of the Duke of *Albemarle*, Earl of *Craven*, Lord *Carteret* and Sir *Peter Colleton*, becoming vested in *John* Lord *Granville*, *William* Lord *Craven*, *John* Lord *Carteret* and Sir *John Colleton*; they, by indentures of the 29th and 30th of *June*, 1705, reciting the conveyance to *Amy*, and his being only a trustee as aforesaid; in consideration of 100*l.* a-piece paid to them by *John Archdale*, Esq; the appellant's father, conveyed the same eighth part to the said *John Archdale* and his heirs.

The appellant soon afterwards married *John Danson*; and thereupon, *Archdale* by indentures dated the 21st and 22d of *October*, 1708, in consideration of 200*l.* paid him by *Danson*, and of love and affection to the appellant, conveyed the said eighth part to *Danson* and the appellant, and their heirs; and *Danson* was put into possession accordingly.

On the death of *Amy*, the legal estate in the said eighth part descended to the respondents *Ann Trott* and *Elizabeth Moor*, as his daughters and coheirs; whereupon *Trott* and his wife and *Elizabeth Moor*, set up a title thereto in their own right, and exhibited a bill in Chancery against the appellant and her then husband, to be put into possession and have an account of the profits; but they afterwards struck *Elizabeth Moor* out from being a plaintiff.

To this bill *Danson* and the appellant answered, insisting on their title, and that the 300*l.* purchase money mentioned in the deeds to *Amy*, was really paid by the Duke of *Albemarle*, Earl of *Craven*, Lord *Carteret* and Sir *Peter Colleton*; which, and also the said trust, *Amy* had acknowledged both by a letter dated the 28th of *August*, 1700, and by an answer put in to a bill in Chancery exhibited against him and others, by the Lord *Carteret* when an infant.

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Afterwards, *Danson* and the appellant exhibited a cross bill against the said *Trott* and his wife and *Elizabeth Moor*, praying that they might convey the legal estate in the said eighth part to *Danson* and the appellant: To which bill the respondents answered, and denied their knowing that the 300*l.* purchase money was paid by the Duke of *Albemarle*, Earl of *Craven*, Lord *Carteret* and Sir *Peter Colleton*; and pretending they knew of no declaration of trust signed by *Amy*, insisted on the statute of frauds; and that *Amy* had, for about eighteen years, spent much of his time in the service of the colony and board of Proprietors, for which he had received no acknowledgment. And *Elizabeth Moor* said, that she and her late husband had assigned and released her interest to *Trott* and his wife and her issue, and therefore disclaimed all right to such proprietorship.

Both causes being at issue, and witnesses examined, the same were, on the 7th of *November*, 1721, heard before the Lord Chancellor *Macclesfield*, who was pleased to declare, that he saw no cause to relieve the respondents *Trott* and his wife on their bill, and therefore dismissed the same: But in the cross cause, decreed it should be referred to the Master to see what expence the said *Amy* was at, and what he deserved for his trouble about the trust, which *Danson* and the appellant should pay to *Trott* and his wife, as the Master should appoint; and they were thereupon to convey the legal estate to *Danson* and the appellant at their charge; but as to costs, his Lordship did not think fit to give any on either side.—This decree was only unless cause as to *Moor*, who made default; but was afterwards made absolute against her, by an order of the 13th of *February* following.

On the 9th of *June*, 1723, the Master made his report, the appellant's husband being then dead, and first mentioning the conveyances to *Amy*, and that the same were only in trust as aforesaid; certified, that the Lords Proprietors of *Carolina*, by warrant under their hands and seals, dated the 17th of *October*, 1694, required *John Archdale*, Esq; then Governor of that province, to order the Surveyor-general to admeasure out 12,000 acres of land for the said *Amy*, and to pass grants thereof to him and his heirs, in consideration of his good services; and that by a grant under the Great Seal of the province, dated the 22d of *August*, 1697, produced by the respondents, the said

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Lords Proprietors, as a further consideration of the said *Amy's* services, created him a Landgrave of the said province, and granted him a barony of 48,000 acres, paying 1*d.* per ann. per acre, to commence from two years after his taking possession; and that by a copy of a further grant, dated the 29th of *September*, 1697, produced also by the respondents, the said Lords Proprietors, by virtue of their original grants and fundamental constitutions, appointed the said *Amy* to be one of the eight hereditary Lords Proprietors, in the room of *Seth Southwell*, Esq; who had purchased the Earl of *Clarendon's* share, and was dead without heirs or assigns who could claim the same. The Master also certified, that by an entry in the Lords Proprietors books, proved before him, dated *October*, 1697, the said grants were all mentioned to be made to *Amy*, in consideration of his good services to the said Lords Proprietors, and particularly for his faithful discharge of the trust reposed in him by four of them; and it was also thereby recited, that the said *Amy* had agreed to reconvey the trust, when required, to *William Thornburgh*, Esq; then guardian of Sir *John Colleton*, who was directed forthwith to act in the said trust, as he did that day at the board, in the presence and with the concurrence of the said *Amy*, and continued so to act afterwards, both at the board and elsewhere.—The Master further certified, that the appellant's Solicitor had insisted, that the said several grants were a sufficient recompence for all the said *Amy's* expence and trouble about the trust, till the 29th of *September*, 1697; when *Thornburgh*, being deputed to act in such trust, took his place at the board; but that it did not appear to the Master, that the 48,000 and 12,000 acres were ever admeasured out to *Amy*, or that any actual grant of the said 12,000 acres was made, pursuant to the said warrant of the 17th of *October*, 1694, or that *Amy* had ever received any profits from the said grants, or any gratuity for his trouble and expence. And the Master also certified, that from the 11th of *March*, 1684, to the 2d of *April*, 1698, *Amy* constantly acted at the board as a Lord Proprietor, and from the 2d of *April*, 1698, to the 21st of *December*, 1699, he acted as a Lord Proprietor under the grant of the 29th of *September*, 1697, as appeared by an instrument, dated the 11th of *April*, 1698, made to *John Blake*, and signed *William Thornburgh* for Sir *John Colleton*, *Thomas Amy* and *William Thornburgh*, from which time, all the deeds and instruments were

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so signed. And also, that by a settlement duly proved, dated the 21st of *March*, 1700, *Amy*, as a portion with the said *Ann* his daughter, assigned his eighth part of the said proprietorship, (late *Southwell's*, and granted to him by the grant of the 29th of *September*, 1697,) to the defendant *Nicholas Trott* in special tail, with remainder in fee; which testified the said *Amy's* acceptance of such grant.—As to *Amy's* expences and trouble in the trust, from the 11th of *March*, 1684, to the 2d of *April*, 1698, the Master certified, that *Amy* had been industrious in promoting the interest of the province, and procuring people to go thither, and meeting and treating them at the *Carolina* coffee-house and elsewhere, and might expend therein 50*l.* a year, and deserve for his trouble 80*l.* a year, in all 130*l.* per ann.; which, for the time aforesaid, amounted to 1696*l.* 9*s.* and which sum, the Master conceived, ought to be borne in average amongst all the eight Lords Proprietors; because *Amy* acted not for the benefit of the appellant's share only, but for the whole province; and that 212*l.* 1*s.* 3*d.* being an eighth part of the said sum, he conceived reasonable to be allowed by the appellant, and therefore appointed the appellant to pay the same on the 20th of *July* then next at the Roll's chapel; and thereupon appointed *Trott* and his wife to reconvey the legal estate in the said eighth part to the appellant, pursuant to the decree.

To this report, the respondents took three exceptions: I. For that the Master had not carried on the 130*l.* a year to the 21st of *September*, 1704, when *Amy* died. II. That the Master had ordered the appellant to pay only an eighth part of the said sum, and not the whole. And III. That the Master had certified several matters no wise relating to the enquiry directed.

The appellant also took two exceptions to this report: I. For that 50*l.* per ann. for *Amy's* expences, and 80*l.* per ann. for his trouble, was too great an allowance; the proofs in the cause which related thereto being very loose, and not sufficient to warrant the same. And II. For that the Master had made no deduction for the grants and allowances, mentioned in the report to have been made to *Amy*; altho' it appeared they were made in consideration of his trouble and expence relating to the trust.

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These exceptions on both sides were argued on the 15th of January, 1723, before the same Lord Chancellor, who was pleased to over-rule both the appellant's exceptions; but allowed the respondent's first and second exceptions, by ordering the appellant to pay the whole 130*l.* *per ann.* down to *Amy's* death, amounting to 2538*l.* 11*s.* to the respondents *Trott* and his wife, and on payment thereof, they were to convey over to the appellant, at her charge, what had been granted to the said *Thomas Amy* by the said Lords Proprietors.

The appellant being prosecuted to a sequestration on this order, it was, on the 29th of October, 1724, ordered, that the said two proprietorships should be sold before the Master, to answer the 2538*l.* 11*s.*; and that a commission of rebellion should be renewed against the appellant, until she should perform the decree.

And on the 16th of February following, the Master reported the respondent *Hugh Watson* the best purchaser of both the said proprietorships at 900*l.* and the same were conveyed to him accordingly. But *Watson* was only a trustee and agent in such purchase, for the respondents *Henry Bertie* and *James Bertie*; and afterwards conveyed one of the said proprietorships to the said *James Bertie* and his heirs, and the other of them to the said *Henry Bertie*, in like manner.

C. Talbot. The appellant after being confined in prison near two years, for not paying the money, appealed both from the decree and the order upon arguing the exceptions, and also from the several subsequent proceedings: And as to the decree, it was, on her behalf, contended, that the respondents *Trott* and his wife were not ordered to pay the appellant's costs, on the dismissal of the original bill; notwithstanding they had, against all conscience and justice, set up a right in themselves to the proprietorship, and endeavoured to defeat the appellant and her late husband of their just title thereto, and put them to great charges in defending it against their unjust pretensions. That the appellant and her late husband were decreed to pay *Trott* and his wife, what the Master should find *Amy* deserved for his trouble, and what he had expended in the trust; whereas it did not appear in either of the causes, nor did *Trott* and his wife pretend, that they were either executors or administrators of *Amy*, and consequently they

they were not entitled to any satisfaction on that account, if any ought to be allowed; and even should the appellant pay them what she was ordered to do, it would be no bar to any demand which might be made by *Amy's* proper representatives on the same account. But if *Trott* and his wife had been *Amy's* representatives, and entitled to any satisfaction for his expences and trouble, yet the appellant and her husband ought not personally to have been decreed to pay the same; because they never entered into any personal contract with *Amy* for that purpose, nor had they any interest in the proprietorship till after his death. And as *Trott's* bill was dismissed, it was apprehended that such a decree could not properly be made against the appellant and her husband, upon their own bill. That the respondents *Trott* and his wife were decreed to convey the said eighth part to the appellant's late husband only; whereas it ought to have been to him and the appellant and their heirs, pursuant to the settlement made by *Archdale*. And that the respondent *Elizabeth Moor* was not decreed to join in such conveyance, altho' she was one of *Amy's* coheirs; for as to her conveyance to *Trott* and his wife, it appeared of their own shewing, to have been by lease and release only, without a fine, so that the legal estate of one moiety still remained in her.—As to the order made on arguing the exceptions, it was insisted, that if the respondents *Trott* and his wife were entitled to have an allowance for *Amy's* trouble and expences, beyond the grants made to him by the Lords Proprietors, yet they ought not to have had so great an allowance as 130*l.* per ann. the proofs in respect of such trouble and expences being very loose, and several of the witnesses examined thereto being persons of mean condition, and incompetent judges of what *Amy* might either expend or deserve. That no deduction or allowance was made to the appellant for the value of the several grants to *Amy*, in consideration of his trouble in the trust; altho' it appeared by the Master's report, that he accepted the grant of Mr. *Southwell's* proprietorship, and thought the same of so great value, as to settle it upon the respondents *Trott* and his wife, as a portion for her. That the 130*l.* a year, was allowed to the death of *Amy*, whereas it appeared by the books of the Lords Proprietors, that after *Amy* had obtained a grant of Mr. *Southwell's* proprietorship, viz. from the 2d of April, 1698, Mr. *Thornburgh* acted in the trust, and *Amy* acted in his own right only. Lastly, that

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the appellant was ordered to pay the whole sum of 2538*l.* 11*s.* when it appeared by the Master's report, and so the fact was, that what *Amy* did was not only for the benefit of the appellant's eighth part, but for the joint advantage and common good of the whole province: And therefore it was conceived, that if the appellant was to pay any thing for *Amy's* trouble and expences, it ought to be no more than an eighth part of what was reasonable to be allowed on that account.

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On the part of the respondents, *Trott* and his wife and *Elizabeth Moor*, it was said, that it appeared both by the proofs in the cause and the Master's report, that neither *Amy*, or these respondents ever had any benefit or advantage from the proprietors warrant to *Amy* for 12,000 acres of land, or the Landgraveship of 48,000 acres, those lands never having been admeasured out, but still remained in the Lords proprietors power of disposal; neither did they make any benefit or advantage of the escheated proprietorship which was *Seth Southwell's*, granted to *Amy* by the proprietors; for the respondent *Trott*, to whom *Amy* conveyed it as a portion with his daughter, was kept out of the possession and profits of the same by the proprietors, ever since the grant thereof to *Trott*. Besides, it did not appear that this proprietorship was granted *Amy*, in consideration or recompence of any services done by him; but only to keep up the number of eight proprietors, according to their own constitutions, and as such *Amy* accepted it. That the appellant submitted to the decree, by her not shewing any cause why the same should not be revived against her, when she was served with a *subpœna scire facias* for that purpose upon the death of her husband; but on the contrary, examined witnesses before the Master to whom the cause was referred. That the appellant not paying the respondents the money reported due, the proprietorship which was *Southwell's* and granted to *Amy*, as well as that claimed by the appellant, were twice advertised in the Gazette to be sold, and were accordingly sold before the Master, and had since been conveyed to the purchaser; and tho' this transaction took up near a year, yet the appellant never complained of the decree during all that time, but suffered the purchase to be compleated, and ought therefore to be bound by it.

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On behalf of the respondent *James Bertie*, it was contended, that he was no party to the decree or proceedings appealed from, and consequently could have no opportunity of asserting his right to the proprietorship, which for a valuable consideration he had purchased from the heirs at law of *Southwell*: And therefore it was conceived, that his title could not be affected by the dispute between the appellant and the respondents *Trott* and his wife, nor ought he to be in any manner drawn into such dispute; and the rather, as the appellant did not by her appeal pretend to be any way prejudiced by the sale of the said proprietorship to this respondent.

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D. Davenport.

BUT, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree and subsequent orders complained of, made in the cause wherein the appellant was plaintiff should be reversed: And it being offered on the part of the appellant, to pay the respondent *Henry Bertie* the money that he paid for the purchase of the proprietorship in question, together with interest for the same; it was further ORDERED, that the Court of Chancery should cause an enquiry to be made, what was the principal sum of such purchase money, and from the time of payment thereof to compute interest for the same; and on the appellant's paying what should be found due for such principal money and interest to the said *Henry Bertie*; it was further ORDERED and ADJUDGED, that he should, at the costs and charges of the appellant, convey the proprietorship in question to her and her heirs; and that the respondent *Elizabeth Moor* should likewise, by proper conveyances at the charges of the appellant, convey all her right to the said proprietorship to the appellant and her heirs. And pursuant to the consent of the appellant's agent, signified at the bar, it was further ORDERED and ADJUDGED, that what the appellant should so pay to Mr. *Bertie*, should be repaid her by the respondent *Ann Trott*, out of the assets of *Nicholas Trott* her deceased husband; and if she should not admit assets, then an account was to be taken of assets. And as to the respondent *James Bertie*, it was ORDERED, that the appeal should be dismissed with 10*l.* costs to be paid him by the appellant.

DECREE reversed.
Jour. vol. 23.
p. 380.

Cafe 66. *Lawrence, Viscount Say and Seal*, - Appellant.

Lady Catherine Jones, Dame Frances Hewett, Peter Hawker, Esq; Thomas William Burman, Fiennes Twisleton, Esq; Nathan Izod, William Clark, William White, and Lord Viscount Harcourt, Respondents.

29th March, 1729.

Viner, vol. 8.
p 262. ca. 19.
1 Eq. ca. ab.
383. ca. 4.

THE Honourable *Frances Ellis*, widow, one of the daughters and coheirs of *James Viscount Say and Seal*, being seised in fee of an undivided moiety of several messuages, lands, tenements and hereditaments in *Nether Norton* and *Overbury Norton*, in the county of *Gloucester*, of the yearly value of 160*l.* duly made her will, dated the 10th of *December*, 1685, and did thereby give and bequeath divers small legacies to several persons in her will named; after which, she devised the said lands and hereditaments in the words following: “*Item, I give and devise all my manors, messuages, lands, tenements and hereditaments whatsoever, with their and every of their appurtenances in Nether Norton and Overbury Norton, or elsewhere in the county of Gloucester, and also all my messuages, lands, tenements and hereditaments, in possession, reversion, remainder, or otherwise, lying in Mortlake, or elsewhere in the county of Surry, to Thomas Erle of Charborough, in the county of Dorset, Esq; and Charles Morgan of the Inner-Temple, London, Esq; and to their heirs and assigns for ever; upon trust and confidence nevertheless, and to the intent and purpose, but not upon condition, that they the said Thomas Erle and Charles Morgan, and the survivor of them, and the heirs of such survivor, shall and will in the first place out of the rents, issues and profits of the said manors, messuages, lands and premises in Nether Norton and Overbury Norton aforesaid, pay and satisfy the several legacies, devises and bequests, hereafter mentioned to be by me given, devised, or bequeathed.*” This devise was followed by a bequest of some annuities for lives, and some pecuniary legacies, after which

which are the following words; viz. "And I do hereby authorise and appoint, that they the said *Thomas Erle* and *Charles Morgan*, and their heirs, shall and will in the first place, reimburse themselves all such necessary charges and disbursements, as they shall from time to time be put unto concerning all or any of the matters herein contained; and from and after their reimbursement and payment of the said several annuities, or rent-charges, legacies and interest aforesaid; to be paid out of *Nether Norton* and *Oversbury Norton* aforesaid, and as the same shall severally and respectively be paid, end and determine: That then they the said *Thomas Erle* and *Charles Morgan*, and their heirs, shall and will pay, or cause to be paid, all the rest and residue of the rents, issues and profits of the said manors, messuages, lands and premisses, to the proper hand of the said *Cecil Fiennes*, or to such person or persons as she shall by any writing under her hand and seal direct and appoint, for and during the term of her natural life; and from and after her decease, they the said *Thomas Erle* and *Charles Morgan*, and their heirs, shall stand and be seised of, and in all and every the said manors, messuages, lands and premisses, to the use and behoof of the heirs of the body of my said daughter *Cecil Fiennes*, severally and successively as they shall happen to be in priority of birth and seniority of age, and to the heirs of their several and respective bodies in tail general; subject nevertheless to the payment of the said annuities, legacies and interest, charged and hereby before by me given out of *Nether Norton* and *Oversbury Norton* aforesaid: And for default of such issue, then upon this further trust and confidence, and I do hereby declare my mind and will to be, that they the said *Thomas Erle* and *Charles Morgan*, and their heirs, shall stand and be seised of and in the said manors, messuages, lands and premisses in *Nether Norton* and *Oversbury Norton* aforesaid, to this further use, intent, and purpose, that from and after the decease of my said daughter *Cecil Fiennes*, without issue of her body, that over and besides the payment of the said former legacies and charges by me hereby given and devised out of *Nether Norton* and *Oversbury Norton* aforesaid, they the said *Thomas Erle* and *Charles Morgan* and their heirs, shall and will, out of the rents, issues and profits of the said manors, messuages, lands and premisses, pay and satisfy the

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“ the several gifts, legacies and bequests, hereafter mentioned;
 “ (that is to say) I give and devise to the said Mr. Francis
 “ *Twisleton* my Godson and son to *George Twisleton* of *Yorkshire*,
 “ the sum of 20 l. per ann. for and during the term of his
 “ natural life; and after his decease, I give and devise the said
 “ sum of 20 l. per ann. to Mr. *Fiennes Twisleton*, for and during
 “ the term of his natural life. Item, I give and devise the
 “ sum of 20 l. per ann. for ever, to be issuing and going out
 “ of my said manors, messuages, lands and premisses, in *Nether*
 “ *Norton* and *Overbury Norton* aforesaid, to be equally dis-
 “ tributed yearly and every year for ever, to and amongst four
 “ poor widows of the said parish of *Nether Norton* and *Over-*
 “ *bury Norton*, at the discretion and nomination of my said
 “ trustees, their heirs and assigns; and from and after the
 “ decease of my said daughter *Cecil Fiennes*, without issue as
 “ aforesaid, I give and devise the said manors, messuages,
 “ lands and premisses, with their and every of their appurte-
 “ nances, to the said Lady *Catherine Jones*, daughter to the
 “ Right Honourable the Earl of *Ranelagh*, in the kingdom of
 “ *Ireland*, Mrs. *Frances Bettenson* of *Scadbury* in the county
 “ of *Kent*, my said Godson *Francis Twisleton* of the parish of
 “ *St. James* in the county of *Middlesex*, Gent. and to the said
 “ *Elizabeth Hughes* of *Jewes* in the county of *Somerset*, severally
 “ and respectively, and to the several and respective heirs of
 “ their respective bodies lawfully begotten, or to be begotten
 “ in tail general, share and share alike; subject nevertheless to
 “ the several annuities, legacies and other payments aforesaid,
 “ hereby charged, given, or devised in, upon, or out of *Nether*
 “ *Norton* and *Overbury Norton* aforesaid.”

In *February*, 1686, the testatrix died, without making any further disposition of her estate; leaving issue the said *Cecil Fiennes*, her only child and heir at law. — And in 1698, *Francis Twisleton*, one of the four devisees, died an infant, without issue; whereby the reversion in fee of one fourth part of the said undivided moiety, expectant on the death of the said *Cecil Fiennes*, came to and was vested in her, as daughter and heir at law of the said testatrix.

On the 23d of *July*, 1715, the said *Cecil Fiennes* died without issue, whereby three fourth parts of the said undivided moiety of the premisses vested in the respondents Lady *Catherine Jones*,
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the said *Frances Bettenson*, then the wife of *Thomas Hewett*, Esq; afterwards *Sir Thomas Hewett*, Knt. deceased, and now the respondent *Lady Hewett*, the said *Elizabeth Hughes*, then the wife of *Thomas Hawker* deceased, and mother of the respondent *Peter Hawker*; and the remaining fourth part descended to *Cecil Mignon*, the niece and heir at law of the said *Frances Ellis*, and also cousin-german and heir at law of the said *Cecil Fiennes*.

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In *Trinity* term, 1716, the respondent *Lady Catherine Jones*, together with *Sir Thomas Hewett* and his Lady, and *Thomas Hawker* and *Elizabeth* his wife, levied a fine and suffered a common recovery of three fourth parts of the said premises; and by an indenture dated the 27th of *June*, 1716, made between the said *Thomas Erle*, the then surviving trustee, and *Lady Catherine Jones*, *Thomas Hewett* and *Frances* his wife, and *Thomas Hawker* and *Elizabeth* his wife, of the first part, *Thomas Wyberd* of the second part, and *Anthony Cracherode* of the third part; the uses of the said fine and recovery were declared to be, as to one third part of the said three fourth parts of the said moiety of the premises, to the use of the said *Lady Catherine Jones* and her heirs; one other third part thereof, to the use of the said *Thomas Hewett* and *Frances* his wife, and their heirs; and the other third part, to the use of the said *Thomas Hawker* and *Elizabeth* his wife, and their heirs.

The appellant being entitled to the other moiety of the premises, and refusing to join in a division or partition thereof into equal moieties, and the tenants refusing to pay a moiety of their rents to the respondent *Lady Catherine Jones*, *Sir Thomas Hewett* and the respondent *Dame Frances* his wife, *Thomas Hawker* who had survived the said *Elizabeth* his wife, and *Cecil Mignon*, who were intitled to one moiety of the premises; they, on the 10th of *March*, 1721, exhibited their bill in the Court of Chancery against the appellant and *Nathan Izod*, *William Clark* and *William White*, the tenants of the premises, to have a partition of the whole estate as against the appellant; and to compel the tenants to pay a moiety of their rents to the plaintiffs, from the death of the said *Cecil Fiennes*.

The said *Thomas Hawker* and *Cecil Mignon* dying, the respondents *Lady Catherine Jones*, *Sir Thomas Hewett* and *Dame Frances* his wife, and *Peter Hawker* the son and heir and adm-
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nistrator of the said *Thomas Hawker*, in whom three fourth parts of a moiety of the said premises became vested, exhibited their bill of revivor against the appellant and the said tenants; and afterwards amended the same, by making the respondent *Thomas William Burman*, the devisee and executor of *Cecil Mignon*, and the respondent *Fiennes Twisleton* her son and heir, who claimed the other fourth part of a moiety of the premises under the said *Cecil Mignon*, parties; and the suit was afterwards revived accordingly.

The appellant and the tenants of the premises, and the respondents *Thomas William Burman* and *Fiennes Twisleton* answered these bills; and *Burman* by his answer insisted, that he was the devisee and executor of *Cecil Mignon*, and as such was well intitled to one fourth part of the moiety in question, and the rents thereof, from the death of *Cecil Fiennes*.—

The appellant by his answer, *inter alia*, insisted, that the said three fourth parts of the moiety, did not, upon the death of *Cecil Fiennes* without issue, vest in the respondents *Lady Catherine Jones*, *Dame Frances Hewett* and *Elizabeth* the wife of the said *Thomas Hawker*, but that the whole moiety upon the death of *Cecil Fiennes*, came in fee simple to the said *Cecil Mignon* as her heir at law; and that the said *Cecil Fiennes* was, by the limitations in her mother's will, tenant in tail of the said moiety, or of the trust thereof, or had such estate or interest therein, that by a fine and common recovery she could dock or bar the same, and all the remainders thereupon limited by the will of her said mother *Frances Ellis*; and further insisted, that *Cecil Fiennes* being so seised of a moiety of the said premises, she, together with her husband *William Fiennes*, in July, 1693, by deed, fine and recovery, duly levied and suffered, conveyed the said moiety to the Lord Viscount *Harcourt* and his heirs, to and for such uses as she should by any writing under her hand and seal appoint. — The appellant further stated, that in 1695, the said *William Fiennes* purchased the other undivided moiety of the premises to him and his heirs; and dying without issue in 1699, that moiety descended to the appellant as his brother and heir. That upon the death of the said *William Fiennes*, several disputes and differences arising between his widow and the appellant, touching his real and personal estate; for compromising thereof, articles of agreement were made and entered into between the said *Cecil Fiennes* and the appellant, dated the

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the 22d of *March*, 1699, whereby she agreed, *inter alia*, to join in a sale of the whole estate at *Norton*, and that one moiety of the money arising thereby should be paid to the appellant; and as to the other moiety, the said *Cecil Fiennes* was to have thereout 500*l.* and the interest of the residue during her life, with power to dispose of 1000*l.* and that the residue should come to the appellant.

In *Michaelmas* term, 1724, the appellant exhibited a cross bill against the Lord Viscount *Harcourt*, the respondents Lady *Catherine Jones*, Sir *Thomas Hewett* and Dame *Frances* his wife, *Peter Hawker*, *Thomas William Burman* and *Fiennes Twisleton*, to have a performance of these articles, and a conveyance of the said *Cecil Fiennes's* moiety of the said premises; to which bill the several defendants put in their answers, before the end of *June* following.

The original cause came on to be heard before the Lord Chancellor *King*, on the 26th of *June*, 1728, and the appellant and the tenants of the premises not appearing, tho' they were served with process to hear judgment, it was ordered and decreed, as between the respondents Lady *Catherine Jones*, Dame *Frances Hewett*, *Peter Hawker* and the appellant, and the respondent *Burman*, that a partition should be made of the lands into moieties, and that a commission should issue for that purpose; one moiety whereof was to be allotted to the appellant, and the other moiety to be subdivided into four parts, of which one fourth part was to be allotted to the respondent Lady *Catherine Jones* and her heirs; one other fourth part to the respondent Lady *Hewett* and her heirs; another fourth part to the respondent *Peter Hawker* and his heirs; and the other fourth part to the respondent *Thomas William Burman* and his heirs: Subject to the annuity of 20*l. per ann.* to the respondent *Fiennes Twisleton* for life, and 20*l. per ann.* for a perpetual charity, mentioned in the will of the said *Frances Ellis*; and mutual conveyances were directed to be made by the parties, for making the partition effectual, and the tenants were to attorn and pay their rents according to such partition; and as to the costs of the said partition, the appellant was to pay one moiety, and the respondents the other moiety thereof; and as to the costs of the subdivision, the same were to be equally paid by the respondents. And it was further decreed, that an account should be taken

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taken by the Master, from the death of *Cecil Fiennes*, of the rents and profits of the moiety to which the plaintiffs in the cause, and the said *Burman* were entitled, and that the appellant should account for such part thereof as he had received, and the tenants *Izod*, *Clark* and *William White* were to account for what was due from them, and the receiver appointed by the Court was to account for what was in his hands; and the appellant was to pay the respondents *Lady Catherine Jones*, *Dame Frances Hewett* and *Peter Hawker* their costs, so far as he had contested their right and title to the said moiety: And this decree was to be binding upon the appellant and the said tenants, unless good cause was shewn to the contrary.

The appellant, upon the usual application and paying the costs of the default, obtained an order for liberty to shew cause against the decree, upon the hearing of his cross cause; and accordingly both causes were heard together before the Lord Chancellor King, on the 16th of November, 1728; when his Lordship was pleased to confirm the former decree against the appellant, as to all matters but the costs of suit, which the appellant was not to pay; and his cross bill was dismissed without costs.

P. Yorke.

T. Lutwyche.

From this decree the appellant appealed; insisting, that by the will of *Frances Ellis*, her daughter *Cecil Fiennes* was tenant in tail of a moiety of *Norton*, or of the trust thereof; and that by her fine and recovery in 1693, which was done upon great advice and consideration, she became seised in fee; or at least of such an estate and interest as she had power to dispose of, and which was actually bound by her articles with the appellant. But supposing, that *Cecil* could not by her fine and recovery bar the remainders limited by her mother's will, yet, by the death of *Francis Twissleton*, one of the four devisees in that will without issue, *Cecil* was unquestionably seised in fee of his fourth part, as having the reversion in fee; and this fourth part, at least, was bound and affected by the articles. That therefore the appellant ought to have the benefit of those articles, so far as *Cecil Fiennes* had a power over the estate, she having had a beneficial agreement under them; and yet, as the decree stood, the appellant was debarred of any benefit under the articles, without the least consideration for the advantages which *Cecil* derived from them.

On

On the other side it was argued to have been the testatrix's intention, as appeared clearly by her will, that the legal estate, during the life of *Cecil Fiennes*, should remain in the devisees in trust, to enable them to pay the legacies and annuities thereby given, and to apply the surplus profits during her life for her proper use, and which was the more reasonable, because she was then under coverture. That it also appeared to have been the intention of the testatrix, that after the death of *Cecil Fiennes*, a legal estate tail should vest in the heirs of her body as purchasers, and not by descent; and it was apprehended, that the construction contended for by the appellant, was contrary to this intent, by changing the equitable interest of *Cecil* in the surplus profits for her life only, into an estate tail. That this construction was not supported by any rule of law, there being no instance where the legal limitation of an estate to the heirs of the body of any person, hath been united to a prior equitable limitation of the surplus profits of such estate to the same person for life, so as to make such person tenant in tail by construction of law: Besides, such a construction is highly unreasonable, as it would put it in the power of *Cecil Fiennes* to defeat her own issue, if she had any, and all the subsequent limitations in the will. That *Cecil* could not bind the premises by the articles, longer than during her own life, as to the three fourths decreed to the respondents *Lady Catherine Jones*, *Dame Frances Hewett* and *Peter Hawker*; and if she could, yet, with regard to those three fourths, and likewise the remaining fourth decreed to the respondent *Burman*, it was insisted, that none of them were bound by the articles, upon which alone the appellant's title depended: Because it appeared by those articles, that the occasion of entering into them, was to put an end to the disputes which had arisen between the appellant and *Cecil*, touching the real and personal estate of his brother *William*; and it did not appear, that there was any dispute touching the moiety of the premises now in question, which was no part of *William's* estate. But if this moiety was intended to be comprised under any general words in the articles, yet they had been long since waived and departed from; no demand having been made by the appellant, upon the foot of these articles, from the 22d of *March*, 1699, when they bore date, to the death of *Cecil Fiennes*, which happened on the 23d of *July*, 1715; during all which time, she quietly enjoyed the premises,

1729.

C. Talbot.

N. Fazakerley.

3

1729.

subject to the charges thereon; nor was any demand made by the appellant upon the respondents under the articles, till he mentioned them in his answer to the original bill, which was 24 years after the date of them. And tho', in 1700, conveyances were made by the appellant and *Cecil* of other estates, yet such conveyances neither recited, or imported to be made in pursuance of the articles; neither were the limitations or provisions therein, agreeable to the tenor of the articles; from whence it was evident, that they were waived, and that the parties came to a new agreement. That it would be a dangerous precedent, if a Court of Equity, at so great a distance of time, after the death of one of the contracting parties, who, if living, might be able to prove an express waiver of the articles, and after a great alteration in the circumstances of persons and things, should decree a specific execution of them; and it would be particularly unreasonable in the present case, because *Cecil Fiennes* being dead, could not now execute the power given her by the articles, of disposing of 1000*l.*; which, in consequence, would give the appellant 1000*l.* more than by the articles was intended for him.

DECREE
reversed
in part.
Jour. vol. 23.
p. 382.

After hearing counsel on this appeal, and also the Judges, touching a point of law to them proposed, it was ORDERED and ADJUDGED, that the decree complained of should be affirmed, except as to the respondent *Burman*; and as to him, the decree was reversed: And it was further ORDERED and declared, that the fourth part of the moiety decreed to the said *Burman* and his heirs, did belong to the appellant and his heirs, and the same was to be conveyed to him accordingly, by the respondent Lord Viscount *Harcourt*, subject nevertheless to that part of the decree, which directed a partition; and that the rents and profits decreed to be accounted for and paid to the respondent *Burman*, should be accounted for and paid to the appellant.

Cases in Parliament.

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William Sparrow and Others, Plaintiffs

William Shaw, Gent. Lessee of }
Ravenscroft Gifford and *David Parry*, } Defendant

in Error.

Case 67.

29th April, 1729.

ON a trial at the Great Sessions for the county of *Flint*, upon the 7th of *April*, 1720, in an ejectment brought for the lands in question, on the several demises of *Ravenscroft Gifford* and *David Parry*, the jury found a special verdict to the following effect :

Grounds and
Rudiments of
Law and
Equity,
p. 209. ca. 8.

That *Thomas Ravenscroft*, Esq; being seised in fee of the premises in question, on the 2d of *August*, 1675, by his will devised the same to his wife for her natural life : And for her better support and credit, and for better discharging his debts, and in the tenderness of his affection to her, he devised to her the full sum of 500*l*. “ to be raised by her, her executors, administrators or assigns, by sale of timber, or by sale of any part of the premises, or otherwise by digging, sinking, getting, and sale of coal on the premises, or any part thereof, at her, her executors, administrators or assign’s election or choice.” And if his wife should die before raising the said 500*l*. the testator gave her power, by will or deed, to appoint any person to raise the said 500*l*. by sale of timber, or by sale of coals as aforesaid, or by sale of any part of the premises as aforesaid ; with a proviso, that if either of his sisters after named, or such person or persons for whom his trustees after named should be trustees, should pay his said wife, her executors, administrators or assigns, the said 500*l*. or according as she should, by will or deed, devise or dispose the same, that then the said power should cease and determine. After which the will proceeds in the following words : “ And from and after the decease of my said wife, I give, bequeath, devise and dispose of all my said estate before meant, named or mentioned, within the said parish of *Hawarden*, consisting in houses, outhouses, lands, tenements and hereditaments, with

“ their

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“ their and every of their appurtenances, unto *Francis Bram-*
 “ *ston*, Serjeant at Law, and to *Charles Nott*, of *Bybroke*, in
 “ the county of *Kent*, Gent. and to *Edward Parry* of the Six
 “ Clerks Office, *London*, Gent. and to the survivor and survivors
 “ of them, upon the trust hereafter mentioned ; (subject never-
 “ theless, to the raising the aforesaid 500*l.*) that is to say, in
 “ trust to and for my loving sisters *Ann Lunsford* and *Dorothy*
 “ *Evatt*, the wife of *Major Evatt*, equally betwixt them dur-
 “ ing their natural lives, without committing any manner of
 “ waste, from and after the decease of my said wife : Provided
 “ always, that what sum or sums of money, in part or in full
 “ of the said 500*l.* hereby left my wife, shall be really paid
 “ my said wife, her executors, administrators or assigns, by
 “ either of my said sisters, in that case, my will and meaning
 “ is, that such monies be likewise raised by getting of coal
 “ upon the premisses only ; and if either my said sisters happen
 “ to die, leaving issue or issues of her or their bodies lawfully
 “ begotten, or to be begotten, then in trust for such issue or
 “ issues of the mother's share, or else in trust for the survivor
 “ or survivors of them, and their respective issue or issues :
 “ And if it shall happen, that both my said sisters die without
 “ issue as aforesaid, and their issue or issues to die without issue
 “ or issues lawfully to be begotten, then the said trustees to
 “ stand and be intrusted to and for my kinsman Mr. *John Swift*,
 “ and the heirs male of his body lawfully to be begotten ; and
 “ for want of such issue, then in trust for my Godson *Ravens-*
 “ *croft Gifford*, and the heirs male of his body lawfully to be
 “ begotten : Provided the said heir male be christened *Thomas*
 “ *Ravenscroft* ; and for want of such issue, then in trust for
 “ the heirs male of *William Ravenscroft* of *Cornhill*, *London*,
 “ mercer, lawfully begotten or to be begotten ; and for want of
 “ such issue, then in trust for my cousin Mr. *George Ravenscroft*
 “ of *London*, merchant, and his heirs for ever, lawfully begot-
 “ ten or to be begotten.”

The jury further found the death of the testator and of his wife, to whom the premisses were given for life ; as also the death of *Ann Lunsford* one of the testator's sisters, without issue, and that *Dorothy Evatt*, the other sister, entered and was sole seised of the premisses on the 1st of *October*, 1686.

That

Cases in Parliament.

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That at the Sessions for *Flint*, held the 9th of *April*, 1688, the said *Dorothy Evatt* levied a fine and suffered a recovery of the premises, the use whereof was declared to her and her heirs.—That *John Swift*, the first remainder-man, after the sisters and their issue, died without issue the 26th of *February*, 1697.—That *Dorothy Evatt* was sister and heir to the testator.—That *Ravenscroft Gifford*, one of the plaintiff's lessors, the next remainder-man after *John Swift*, went beyond sea in 1693, where he continued till 1719.—That *Edward Parry* was the survivor of the three trustees in the will, and was dead, and that *Edward Parry*, the other lessor of the plaintiff, was his heir.—That *Dorothy Evatt*, the surviving sister, died the 12th of *July*, 1698, without issue.—And that *Ravenscroft Gifford*, the remainder-man, and *David Parry*, the heir of the surviving trustee, entered and severally leased to the plaintiff, upon whom the defendants entered and dispossessed him.

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Upon this verdict, judgment was given in the Grand Sessions of *Flint*, on the 23d of *March*, 1721, for the defendant.

Whereupon a writ of error was brought, returnable in the Court of King's Bench; where, after several arguments, it was the unanimous opinion of all the Judges of that Court, that the judgment given below was erroneous; and in *Easter* term, 1728, that judgment was reversed accordingly.

To reverse this judgment of reversal, a writ of error was brought in Parliament; and on behalf of the plaintiff in error it was argued, that by the words and intention of the will, the testator's two sisters, *Ann Lunsford* and *Dorothy Evatt*, had an estate tail, as tenants in common, with cross remainders of their several moieties; and as *Ann Lunsford* died without issue, *Dorothy Evatt* became entitled to the whole estate, and had sufficient power to make a good title to a purchaser: For, that in construction of law, a devise to one, with a limitation over to another, if such first person dies without issue, creates an estate tail in that person, as well as if the devise had been to him or her, and the heirs of his or her body. But as *Dorothy Evatt*, under whom the plaintiff claimed, was heir at law of the testator, and, as such, would have been entitled to the estate in question, had no will been made; it was conceived, that supposing the words of the will to be ambiguous, yet, as they were capa-

P. Yorke.

T. Bootle.



T. Reeve.

N. Fazakerley.

J. Strange.

ble of a construction in favour of the person, who was heir at law of the testator, such construction ought to be received.

For the defendant in error it was said, that two questions arose upon this case: I. Whether the devise, being to trustees and the survivor of them, without any limitation to their heirs; there was now, in the heir of the surviving trustee, an estate sufficient to support the trusts in the will? II. Whether, by this will, the testator's sisters *Ann Lunsford* and *Dorothy Evatt*, took an estate tail in the premises, or only an estate for life?

As to the first question it was argued, that this devise was to the trustees, upon the trusts aftermentioned, which trusts were such as might continue for ever; the intent of the testator being apparent to give them a fee, which the law would raise by implication: For there is no difference in law or reason, between a devise to a man for ever, which has always been construed a fee; and a devise to a man, upon trusts to continue for ever. And if the will did not pass the fee simple to the trustees, it would pass it to the sisters by way of immediate devise.

As to the second and principal question, it was contended, that the two sisters took only an estate for life. It is a known rule in the construction of wills, *that the intention of the deviser ought in all cases to be observed, if it can be consistent with the rules of law*: Now this devise was expressly to the sisters *during their natural lives*, with the addition of this restrictive clause, *without committing any manner of waste*; which shewed the intent of the testator strongly, that his sisters should have only an estate for life; for if he had intended them an estate tail, he could not have restrained them from committing waste. That there was annexed, as well to the wife's estate for life, as to that of the sisters, a power to raise 500*l.* But the wife's power was much ampler than the sisters; for she might raise it by sale of timber, or of any part of the premises, or by sale of coal; the sisters were restrained to raise it, by getting of coal only, from whence it was plain, that the testator intended them only an estate for life: And therefore, he gave them power to raise money by getting of coal, which is one kind of waste, and a tenant for life stood in need of that power; but if he had intended them an estate tail, he would never have given them such a power; because it is a power incident to an estate tail,



not only to commit waste in that particular, but in all other particulars whatsoever. Besides, this power to the sisters intervenes between the devise to them for life, and the devise to their issue; which shews that the testator's intent was to complete the devise to his sisters, of what estate they were to have, before he made any devise to their issue. And it was observable, that the power was annexed to the estates given to the wife and sisters for life, and not to the estate given to the issue of the sisters, to whom he intended a greater estate than for life; which could be for no other reason, than because the tenants for life stood in need of such an express power, but there was no occasion to annex it to the estates tail, because it was incident to them. That the next devise was to the issue of the sisters, with the limitations annexed thereto, as in the will; and it was contended for by the plaintiffs in error, that the word *issue* is a word of limitation, and shall raise an *estate tail* in the sisters: But it was hoped, that *issue* would here be construed as a word of purchase, and a designation of the persons intended to take the estate; in which case, it could never extend to enlarge the estate given to the sisters for life. The word *issue*, in a conveyance at common law, is always a word of purchase. In a will, it may sometimes be taken as a word of limitation, to answer the testator's intention, where such intention appears manifestly from the construction of the whole will. But in the present case it was plain the testator intended, that the issue of his sisters should take by purchase, and therefore he made use of the word *issue*, as a designation of the persons who were to take; for he did not barely give the estate to the issue or issues of his sisters, but further devised it to the survivor or survivors of them, and their respective issue or issues; that is, to the issue or issues of such issue or issues as his sisters should leave: For the word *survivors*, in the plural number, is not applicable to the sisters, there being but two of them, but must relate to their issue. The first limitation therefore is, to the issue of the issue; whence the first issue, to whose estate this limitation is annexed, must take by purchase.

It has been objected, that the word *issue* is *nomen collectivum*, and shall take in all the descendants, and consequently create an estate tail in the sisters. But the word *issue* is only to be understood in this sense, when it is a word of limitation; for it has always been taken in a different sense, when it is a word of purchase.

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purchase.—It has also been insisted on, that an estate tail shall be raised in the sisters by implication, from these words, *if it shall happen, that both my said sisters die without issue as aforesaid, and their issue or issues to die without issue or issues*; then the subsequent remainders are given. Wherever an estate tail has been raised by implication, it has been to answer the apparent intention of the testator; but in the present case, the very words from which an estate tail is to be implied, shew that the testator took notice, that he had before limited the estate *to the issue of the issue*. Besides, the words are not general, *if both my said sisters die without issue*, but *if both my said sisters die without issue as aforesaid*; which shewed the testator's intention not to enlarge the estate before given to his sisters. Upon the whole, the defendant hoped that the judgment of the Court of King's Bench was well given, and that a different determination would be contrary to the express words and intent of the testator; and would be carrying this point further than it ever yet has been carried, in order only to enable the sister to destroy the remainders limited by her brother's will, against his plain intention.

Jour. vol. 23.
P. 403.

AFTER hearing counsel on this writ of error, upon the 25th of *April*, 1729, and the Judges attending according to order, and having conferred with the Lord Chancellor; his Lordship acquainted the House, "That the Judges of the King's Bench
" were of the same opinion they were, when they gave judgment in this case; but that there was a difference of opinion
" in the Judges of the Common Pleas and Barons of the Exchequer, who desired time to confer, in order to be more
" clear in their opinions:" Whereupon it was ORDERED, that the giving judgment in this case should be adjourned till *Tuesday* next; and that the Judges should then attend, in order to deliver their opinions.

JUDGMENT
reversed.
— p. 409.

ACCORDINGLY, on *Tuesday* the 29th of *April*, all the Judges attended; and after delivering their opinions *seriatim*, in relation to a point of law to them proposed, it was ORDERED and ADJUDGED, that the judgment given in the Court of King's Bench, reversing a judgment given in the Court of Great Sessions in the county of *Flint*, should be reversed; and that the said judgment of the Court of Great Sessions should be affirmed.

Robert

Robert Ross, John Gordon, and Alexander Hamilton, } Appellants. Case 68.

The Rev. *Samuel Close* and *Catherine* }
his Wife, and *Margaret* and *Mary* } Respondents.
Close, their Infant Children, }

2d February, 1729.

SIR *Robert Maxwell*, Bart. being seised in fee of the lands of *Bally Castle*, and other lands in the county of *London-derry*, in *Ireland*, and having issue by his first Lady, *George Maxwell* his only son and *Elizabeth* his only daughter; he, in the year 1684, disposed of his said daughter in marriage to *James Butler*, Esq; and acknowledged a statute staple for 2000*l.* to Mr. *Butler*, for securing her marriage portion.

In 1692, Sir *Robert* intermarried with Dame *Margaret* his second wife; and by a settlement dated the 10th and 11th of May, 1692, made in pursuance of an agreement before the marriage, and in consideration thereof, and of a considerable marriage portion had with her, he conveyed the said lands to *Henry Lesley* and *James Maxwell* and their heirs, to the use of himself for life; remainder to Dame *Margaret* for life, for her jointure; remainder to his first and every other son by her in tail male; remainder to the heirs of his body by the said *Margaret*; remainder to *William Godfrey* and *Henry Maxwell* for 99 years, in trust out of the rents, issues and profits, to pay the executors or administrators of Dame *Margaret* 200*l.* and also to pay such legacies as he should leave or devise by his last will; remainder to his own right heirs.

Some time after making this settlement, Sir *Robert Maxwell* died without any issue by Dame *Margaret*, who thereupon became entitled to the lands for her life; *Elizabeth* the daughter of Sir *Robert* and wife of *James Butler*, died soon afterwards, leaving issue only one son named *James*; and *James Butler* the father, after the death of the said *Elizabeth* his first wife, intermarried with the said Dame *Margaret* in the year 1694; and had issue by her, the respondent *Catherine* their only child.

1720.

The said *James Butler* the elder died in 1713, but before his death made his will, and appointed Dame *Margaret* executrix thereof; and thereby devised the said statute staple and the benefit thereof, from and after the death of the said Dame *Margaret*, in trust as to one third part thereof, for his son the said *James Butler* junior; and as to the other two thirds, in trust for the respondent *Catherine* his daughter.

By the death of Sir *Robert Maxwell*, the reversion and inheritance of the lands, subject to the jointure and the said term of 99 years, and also to the said statute staple, descended to Sir *George Maxwell* his only son and heir; who, upon the revolution in 1688, became a papist, and afterwards continued in the open profession of the popish religion during all his life; and died seised of the said reversion, some time in the year 1719, without issue.

On the death of Sir *George Maxwell*, this reversion descended to the said *James Butler* junior, as his nephew and heir at law, who was a protestant; and he being seised thereof, did by deeds dated the 21st and 22d of *October*, 1720, in consideration of 200*l.* really and *bona fide* paid to him, convey the same, and all his estate and interest therein, to Dr. *Robert Maxwell* and his heirs, in trust for the said Dame *Margaret Butler*, and her heirs: Which deeds were duly registered according to the laws of *Ireland*, on the 24th of the said month of *October*, 1720, and the said Dr. *Maxwell* by deed duly executed, declared the said trust accordingly.

Dame *Margaret* being so entitled to the inheritance of the lands, and a marriage being afterwards agreed upon between the respondents *Samuel Close* and *Catherine*, indentures of lease and release dated the 9th and 10th of *January*, 1721, were executed between Dr. *Robert Maxwell* of the first part, Dame *Margaret* and the respondent *Catherine* of the second part, the respondent *Samuel* of the third part, *John Maxwell* and *Robert Maxwell*, Esqs; of the fourth part, and *Samuel Waring* and *James Manson*, of the fifth part; whereby, in consideration of the said intended marriage, and for providing for the respondent *Catherine* and her issue by the respondent *Samuel*, Dr. *Robert Maxwell*, by the consent of Dame *Margaret*, conveyed the said lands to the said *John* and *Robert Maxwell*, and their heirs, subject to the said jointure, statute staple and term, to the use of the respondents

Samuel

Samuel and *Catherine* during their joint lives; and in case *Catherine* should survive *Samuel*, then as to two thirds thereof, to the use of *Catherine* during her life; and as to the other third part, and also the two thirds after the death of *Catherine*, to the use of the first and every other son of the said *Samuel* by *Catherine* in tail male; and for default of such issue, to the use of the daughters of the said *Samuel* and *Catherine*, and the heirs of their bodies; and for want of such issue, to the right heirs of Dame *Margaret*. These deeds were also duly registered on the 3d of *July*, 1722.

The marriage soon afterwards took effect, and the respondents *Samuel* and *Catherine* had issue two daughters, namely, the other respondents *Margaret* and *Mary*.

Sir *George Maxwell* being a papist, and continuing so to his death, was disabled by an act of Parliament made in *Ireland*, 2^o *Annæ*, to prevent the further growth of popery, from making any voluntary conveyance or disposition of his real estate; and by this act, all estates whereof any papist is seised in fee simple, or fee tail, are made descendible to his sons, or other persons inheritable thereto, notwithstanding any such voluntary disposition or conveyance.

But notwithstanding this disability, Sir *George Maxwell*, by lease and release dated the 15th and 16th of *October*, 1710, took upon him, without any consideration, to convey the said reversion in fee to *Thomas Maxwell* of *Cuil* in *North Britain*; who soon afterwards dying without issue, Sir *Robert Maxwell* of *Orchard's Town*, claimed as his cousin and heir; and by deeds of lease and release dated the 3d and 4th of *April*, 1722, conveyed all his estate and interest in the said reversion to *John Nelson*; who, together with the last named Sir *Robert*, and *Isabella* the widow of the said *Thomas Maxwell*, by lease and release dated the 10th and 11th of *September* following, and by a fine afterwards levied, conveyed all their estate and interest therein to *Hector Graham* and his heirs, in trust for the appellants.

The appellants thus claiming a right to the said reversion, on the 19th of *March*, 1723, filed a bill in the Court of Chancery in *Ireland*, against the said Dame *Margaret* and others, setting forth their said title, and praying, *inter alia*, to have the conveyance

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veyance made by the said *James Butler* to *Dr. Robert Maxwell* set aside.

The respondents *Samuel* and *Catherine* finding, that the appellants insisted on the said pretended title under the said deeds and fine, and that Dame *Margaret*, after she had answered the said bill, on the 28th of *January*, 1724, exhibited a bill in the said Court of Chancery in her own name against the appellants, without taking any notice of the settlement made upon the marriage of the respondents *Samuel* and *Catherine*, or of the title of them and their issue to the premises under the same; did, on the 1st of *June*, 1727, exhibit a bill in the said Court in their own names, and in the names of their said two daughters, against the appellants and others; setting forth, that *Sir George Maxwell* was in and before the year 1710, a professed papist, and died so; and, stating the conveyance made to *Dr. Robert Maxwell* by the said *James Butler* junior, the said *Dr. Robert Maxwell's* deed declaring the trust for Dame *Margaret Maxwell*, and the said settlement made upon the marriage of the respondents *Samuel* and *Catherine*; charged that in the deeds alledged to have been executed by *Sir George Maxwell* to the said *Thomas Maxwell*, there was a proviso, or power of revocation expressly reserved to *Sir George*, to revoke and make void the same at his pleasure, and that he afterwards did revoke the same, and that the said deeds were found amongst the other papers of *Sir George* after his decease; and therefore prayed, that the respondents might be at liberty to examine several witnesses therein named, to the proof of *Sir George Maxwell's* being a papist on the 15th and 16th of *October*, 1710, and of his dying so; and that the testimonies of the said witnesses might be perpetuated.

The appellants put in an answer and plea to this bill; and in their answer confessed, that by the death of *Sir Robert Maxwell* of *Ireland*, *Sir George*, as his only son and heir, became seized of the reversion and inheritance of the premises: That the said *Sir George* died without issue in 1719, and that the said *James Butler* was his heir at law, and always a protestant; they also confessed the execution of the deeds by the said *James Butler*, junior, to *Dr. Maxwell*, but insisted on the deeds of the 15th and 16th of *October*, 1710, made by *Sir George Maxwell* to *Thomas Maxwell*; and admitted, that there was therein con-

tained

tained a power of revocation; they also insisted on the several other deeds made by Sir Robert Maxwell of Orchard's Town, and the said Isabella and John Nelson, and that the appellants were entitled to the reversion under those deeds: And as to that part of the bill, by which the respondents prayed to be at liberty to examine witnesses therein named, to prove that Sir George Maxwell was a papist on the 15th and 16th of October, 1710, or at any time before or after; and that the testimony of such witnesses might be perpetuated, and given in evidence against them, or any other persons deriving under them; they pleaded, that the said Sir George Maxwell was born of protestant parents, and that he was bred a protestant, and professed the protestant religion in his infancy, and after he attained his full age, to the time of his death; and that he was not convicted in his life-time, upon any indictment or information, for being perverted from the protestant to the popish religion: That the said Thomas Maxwell, Sir Robert Maxwell of Orchard's Town, Isabella Maxwell and John Nelson, were always protestants; and that the appellants and the said Hector Graham were protestants, and born of protestant parents; and further pleaded, that the appellants were, for the valuable consideration of 700*l.* of money paid, purchasers of the reversion and inheritance of the premises under the said deeds, without any notice of Sir George Maxwell's being a papist on the said 15th and 16th of October, 1710, or at any time after.

This plea being argued before the Lord Chancellor of Ireland, on the 20th of November, 1728, his Lordship was pleased to over-rule the same.

The appellants therefore appealed from this order, and on their behalf it was argued, that as they had sworn themselves purchasers for a valuable consideration, without notice of the respondents title, it was apprehended to be contrary to the usual practice of Courts of Equity, to allow an examination of witnesses *in perpetuam rei memoriam*, in order to defeat the title of such purchaser without notice; but that the respondents ought to proceed to recover as they could, without the interposition or aid of a Court of Equity. That this attempt ought to meet with the less encouragement in the present case, because it appeared, that Sir Robert Maxwell the father died in 1693, that Sir George the son lived till 1719, that no prosecution was

J. Willes.
W. Hamilton.

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commenced against him during his life, nor was any attempt made to prove him a papist, till this bill was filed in the year 1727; several years after the purchases were made and memorials of them duly registered. That whatever might be the case against the person claiming under a voluntary settlement from a papist, the difference would be very great as to those persons who were real purchasers; and especially in a case like the present, where the purchasers were protestants, and where the respondents claim was under the heir at law of that very person, under whom the appellants claimed to be purchasers. That if it is ever allowed to examine witnesses *in perpetuam rei memoriam* against a purchaser, it is only where the title of the plaintiff is clear and indisputable; but in this case the appellants by their answer, denied that they believed that any such settlement was made: And it was observable, that tho' the respondents were defendants to the bill brought by the appellants, and put in their answer, yet they did not thereby disclose or mention the now pretended settlement. And therefore it was hoped, that the order would be reversed, and the plea allowed.

P. Yorke.
C. Talbot.

On the other side it was insisted, that by the act 2^o Anna, all estates whereof any papist then was, or should at any time after be seised in fee simple, or fee tail, should be of the nature of gavelkind, and should descend after the death of such papist to his sons, or to such other persons as should be inheritable thereto, share and share alike, notwithstanding any disposition or alienation to be made thereof by such papist, unless for valuable consideration of money really and *bona fide* paid; but that in case the heir at law of such papist should be a protestant, he should have the whole, according to the course of the common law. That the deeds of October, 1710, executed by Sir George Maxwell to Thomas Maxwell, under which the appellants claimed, were merely voluntary, and not made for a valuable consideration in money really and *bona fide* paid, according to the directions of the said act; that there was a power of revocation contained in those deeds; and that the same being at all times after the execution thereof in the custody of Sir George, and found amongst his papers after his death, were sufficient proofs of their being voluntary, and therefore fraudulent as against the protestant heir at law. That no conviction by indictment or information, was necessary to prove a person a papist, so as to

make

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make his estate descendible in gavelkind, or to make void any voluntary disposition of his estate; altho' such conviction would be necessary, to subject a papist to the penalties inflicted on him by the laws of *Ireland*, for turning from the protestant to the popish religion. That notice was not necessary of the party's being a papist, who made such voluntary disposition; nor would the want of notice make such disposition good, either as to those who immediately claimed under it, or to any other persons who might claim as purchasers from them. That by virtue of the settlement made on the marriage of the respondents *Samuel* and *Catherine*, all the respondents were purchasers of the premises for a valuable consideration, under the protestant heir at law of a person who was really a papist. That the respondents could not during the life of *Dame Margaret*, bring any action or suit for trying their title to the premises; and if the witnesses to prove *Sir George Maxwell's* being a papist should all happen to die in her life-time, the respondents would be deprived of their evidence, and might be put to great inconveniencies; but the appellants could not be hurt by such examination, if, as they alledged, *Sir George* was and continued a protestant. The order therefore ought to be affirmed, and the appeal dismissed with costs.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the order therein complained of, affirmed.

ORDER
affirmed.
Jour. vol. 23.
P. 470.

William Kelyrack, Richard Richards,
Philip Kelynack, and One hundred
and sixteen Others, Parishioners and Appellants.
Fishermen of the Parish of *Paul* in
the County of *Cornwall*,

Case 69.

William Gwavas, Gent. Respondent.

26th February, 1729.

THE respondent was owner of the rectory impropriate of the parish of *Paul*, which is an ancient rectory adjoining to the sea, and extending into *Mount's Bay*, and hath time immemorial

Bunb. 239.
256.

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immemorial been a fishing town; and within the said rectory and parish there is, and time out of mind hath been used and approved, the following custom of tything fish, viz. —

“ That every parishioner of the said parish and others, being
 “ proprietors or occupiers of any fishing boat, net, or other
 “ fishing craft, usually tyed, moored, or kept within any part
 “ of the said rectory or parish, when not actually used in
 “ fishing, have paid and ought to pay to the owner or proprie-
 “ tor of the said rectory for the time being, the tenth part of
 “ all great and small fish taken in the said bay, or other adjoin-
 “ ing sea or seas, with such boats, nets, or fishing craft, except
 “ only such fish as have been used for bait to catch other fish,
 “ and also fish meased (or caught by the head) in the sleeves of
 “ certain nets called *saynes*. ”

These *saynes* are very long and deep nets, of a close or narrow mease, and are used in this manner; viz. in bright days, persons called *bewers*, being placed on adjacent hills to discover the shoals of fish, give signs to the *sayners*, or persons attending the *saynes*, whereabouts the shoals of fish are; and then the *sayners* draw out their *saynes*, and encompass the fish and draw towards the shore, and by degrees the whole shoal is, by the sleeves, guided into the codd of the *sayne*, and there taken without being hung by the head: But sometimes it happens, that some of the fish being distasted, strike against the sleeves, and there are hung by the head; but being few, and anciently thought not fit to be used, were given to the poor fishermen for their trouble in taking them out; and the owner of the craft had no part thereof, and therefore no tythe was paid or demanded for the same.

Driving nets were anciently small nets about ten fathoms long, and when the fishermen went out to take hook fish they usually hung at the stern of their boat a driving net, against which, as the boat crossed the sea or current, the pilchards struck and were caught by the head, and thence taken as occasion required to bait their hooks; and if any remained when the fishermen came on shore, they sent them home to preserve for bait for the winter season.

The respondent's father, *William Gwavas*, Esq; deceased, became owner from his ancestors of this rectory in 1669, about which time driving or drift nets began to be used to catch pilchards

chards or herrings for merchandize; it being observed, that tho' meased, or hung by the head, they were fit to be cured; and this use of drift nets increasing, (which also spoiled the sayning trade, as it broke or dispersed the shoal of fish, before it came near the shore) and the fishermen refusing to pay the tythe of the fish so taken, because they were hung by the head, as were those taken in the sleeves of saynes, of which no tythe was paid; thereupon the respondent's father brought his bill in the Court of Exchequer, against several of the fishermen for such tythe, charging the custom to be as aforesaid. And in the fishermen's answer to this bill, they admitted the then plaintiff's title to the tythe in kind of hook fish, and to a customary payment for pilchards caught in saynes, (other than what meased or hung by the head) viz. the tenth part of what they sold for fresh, at the price which the owners of the craft paid the fishermen for their part, being one half; and insisted, that no tythe was payable for pilchards caught in driving nets.

The said cause was heard, many witnesses having been examined on both sides, on the 24th of June, 1680, and upon a very full debate, the Court declared, that the plaintiff ought to be paid the tythe in kind of all sea fish taken by the defendants by boats, &c. kept in the said rectory; whether taken with saynes, or drift nets, or other craft, except what was used for bait, or meased in the sleeves of saynes; and that payment of the tenth penny for which the fish were sold, was, in effect, payment of tythe in kind, and that the late usage of taking pilchards in drift nets for other purposes than for bait, was fraudulently put in practice to defeat the custom, but ought not to avoid the payment of tythes, and decreed the defendants to account accordingly: Which account was afterwards taken, and, upon the report thereof, was confirmed on the 9th of December, 1680.

Soon afterwards, the defendants in that cause, with others of the fishermen, to the number of 160 in all, signed a note or memorandum on the back of the writ of execution of the said decree, promising to pay tythes in the words of the decree, to the then plaintiff, his heirs and assigns.

And from the time of this decree, tythes were paid, agreeable to the custom, to the respondent's father during his life, and

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after his death to the respondent's mother, who held the rectory as her jointure, and from the time of her death, to the respondent himself, until the year 1722; when some of the fishermen refused to pay their tythes of pilchards and herrings caught in drift nets, and their example being soon followed by many others; the respondent, in *Hilary* term, 1724, exhibited his bill in the Court of Exchequer against the appellants, (two of whom, viz. *Jahn Tregurtha* and *John James*, were defendants in the former cause) for a discovery and satisfaction of the tythes of pilchards and herrings, caught by the appellants since the 25th of *March*, 1722, in *Mount's Bay*, and at or near *St. Ives*, *Fowey*, *Mevagissey* and other fishing places in the seas adjoining, by and with fishing craft kept within the said rectory as aforesaid; the bill charging the custom to be as above stated, and to have been established by the former decree, and that the appellants had so taken within that time great quantities of pilchards and herrings, but refused to pay the tythe thereof, pretending that there was no such custom, especially for fish caught near *St. Ives*, *Fowey*, &c. or other remote fishing places, or in driving nets.

The appellants put in three several answers to this bill; and altho' by the last of such answers, they said they had paid all their tythe fish to the respondent or his agents, up to the 29th of *September*, 1724, yet, by the first answer, they denied that they knew or believed, that there was such custom as aforesaid, of paying tythe; and insisted, that such custom was unreasonable, and from which they hoped to be relieved, for that the respondent had no lands in the said rectory whereon to moor their boats, and they were forced to pay others for such liberty, and also port farm to the Duke of *Cornwall*, and were at great charges for boats and nets, which would not last above four years; whereas *saynes*, being used near the shore, would last a man's age, and that the tenth fish was sometimes half, and at other times the whole profit: They also insisted, that the former decree was not binding on them, they being no parties thereto, except the appellants *John Tregurtha* and *John James*, who said, that they conceived that decree to be hard, and therefore not binding on them.

Issue being joined, several witnesses were examined on both sides; and on the 3d of *July*, 1727, the cause was heard, and directions

directions were given for trying the custom on an issue at law, at the next Assizes for the said county; and, in the mean time, by consent, the appellants were to pay their tythes as usual of late years, before the suit began, without prejudice.

The respondent petitioned for a rehearing; because the custom, as set forth by his bill, was allowed and confirmed by the decree in his father's cause, which appeared to have been made on very solemn and mature debate, and to have been acquiesced in above 47 years; so that it was become very difficult to shew, by living witnesses, what the custom was, previous to that decree: And also, because it appeared thro' the whole series of depositions on both sides in this cause, that there was not the least colour or doubt, but that the tythes of pilchards and herrings caught in the codds of *saynes*, or the tenth penny of what the same had been sold for, had been continually paid; and that the only doubt, if any, was about the tythe of fish taken in drift nets, which was a matter fully settled by the former decree.

On the 9th of *May*, 1728, the cause was reheard, when the appellants counsel still insisting to try the custom at law, the Court directed that a trial should be had at the bar of the said Court, by a special jury of the county of *Middlesex*, to try whether there was such a custom as was laid and insisted upon in the bill, or not.

On the 6th of *November* following, the trial was accordingly had, and several aged witnesses, brought from *Cornwall*, were examined on the said trial; and, after a long defence made by the appellants, the jury gave their verdict to the satisfaction of the Court, and thereby found that there was such custom as aforesaid.

On the 5th of *December*, 1728, the cause was heard upon the equity reserved, when the Court declared, that the custom was good at law, and decreed that the same should be established; and that according to such custom, the appellants should account for the value of the tythe, or the tenth part of all pilchards and herrings by them taken, since the 25th of *March*, 1722, to the time of exhibiting the bill; and that the respondent should have his costs both at law and in equity, to be taxed by the Deputy Remembrancer.

From

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J. Shepherd,

T. Bootle.

From this decree, the present appeal was brought; and, on behalf of the appellants it was contended, that by the variation of the first order or decree, in directing the issue to be tried by a jury of *Middlesex*, instead of a jury of *Cornwall*, the appellants were put under great difficulties and disadvantages, in bringing their witnesses from so great a distance as near 300 miles, and especially such of them as were aged and infirm; and that a jury of *Middlesex*, who were entire strangers to the customs of *Cornwall*, and to the manner of fishing there, could not be so well able to judge upon the matter in issue, as a jury of that county. That the custom was unreasonable and void, inasmuch as it required the tenth part of the fish to be paid in kind, without any allowance or deduction to be made for the charges and expences in catching the same, or in providing boats, nets and other fishing craft; whereas the tythes demanded in this case, could only be due by custom, and claimed as a personal tythe, and as such, all expences and charges of that kind ought to be deducted; but which, tho' it most commonly amounted to the half, and sometimes to the full value of the fish so taken, was not provided for by this decree. And tho' the mooring, tying and keeping of boats, nets and other fishing craft in the parish, when not used, were assigned as a reason or consideration for the custom; yet the respondent did not find or provide any place convenient for that purpose, or contribute towards the charge thereof: But the appellants were forced, at their own expence, to procure proper places for keeping their fishing craft, both when and when not used; and to make yearly payments to the owners of the soil for the same. That by this custom, the appellants are obliged to pay tythes in kind for all fish, not excepted in the custom, which are taken not only in *Mount's Bay*, but also in the adjoining seas, which is unlimited and unconfined; and in consequence thereof, they are obliged to land their fish in the said parish, and not elsewhere, to be there sold or taled, and the tythes to be paid in kind, before they can cure or dispose of them, tho' taken in places ever so remote; which many times, from great distance and stormy weather is impracticable, and puts them under great difficulties and hazard, either of keeping the fish so long, as to render them unfit for use, or being deprived, by attempting to land them, of the opportunity and advantage of catching those quantities, which they otherwise might take. That if this custom should prevail, it would tend to the ruin of the appellants and

their families; and they would be under the necessity of breeding up their children to other business, in order to enable them to get a living; whereby a very valuable nursery for seamen would be destroyed, which has, in all times, afforded a supply of the ablest men for the public service in time of need; and the fishing trade in those parts, so advantageous to the nation, would be in great danger of being lost. It was therefore hoped, that the decree would be reversed, or at least so altered, as that the appellants might only account for the tenth penny of the profit made of the fish by them taken, first deducting their charges and expences in catching such fish, and in providing boats, nets and other fishing craft, and for mooring and keeping the same when not used.

To all this it was answered on the other side, that the custom would be vain and fruitless, if it extended only to such as were owners of the fishing craft, with which the fish were taken; because, in that case, every one might exchange with his neighbour the use of their craft, and none catch a fish in his own craft. That the distance at which fish might be taken and brought to shore fresh and good, would sufficiently limit the extent of the custom, as to the fish taken in *Mount's Bay* and the adjoining seas, but any other limits would wholly frustrate the custom; since it would be impracticable for the Rector to discover, whether the fish were taken within, or beyond such other limits. That no direction was given by the decree as to landing the fish, it only established the custom, and directed the appellants to account for the value of the tythes demanded by the respondent; and there was nothing, either in the custom or decree, which obliged the appellants to do any thing impossible or unreasonable. That the tythe of fish being payable only by custom, was admitted; but that it could be claimed only as a personal tythe, *deductis expensis*, was denied; for where, as in the present case, tythes in kind are due only by the custom, it seems impracticable to deduct the expences. That the statute of *Edward VI.* which gives remedy for predial and personal tythes, enacts expressly, that tythe fish be paid according to custom; and therefore this is within the reason of predial tythes, where no allowance or deduction is made for the rent of the land, plowing, sowing, reaping, &c. and the answer in this case is, that no such expences are allowable by the custom.

T. Reeve.
G. Eyre.

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DECREE
affirmed.
Jour. vol. 23.
p. 490.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of, affirmed.

Case 70. *Charles Selby Amberst, Esq; Administrator* of Dame *Margaret Strode*, his late Wife, who was the Widow of *Sir George Strode, Knt.* Appellant.

William Robinson Lytton, Esq; Devisee in the Will of *Lytton Lytton, Esq;* who was the only Son and Heir of Respondents the said *Sir George Strode, Francis Mascall* and *James Bedingfield*.

12th March, 1729.

Viner, vol. 15.
p. 460. ca. 20.
2 Eq. ca. ab.
602. ca. 33.
Ferne 165.

SIR George Strode being seised in fee of the manor of *Itchingham* and divers lands and hereditaments in the county of *Sussex*, of the yearly value of 500*l.* and upwards, part whereof was subject to two several mortgages made by him to *Francis Brook*, each for a term of 1000 years, for securing 1100*l.* and interest; and other part whereof was subject to another mortgage made by him to *Mary Seyliard*, for another term of 1000 years, for securing 500*l.* and interest; and Sir George being also seised of other estates in the counties of *Worcester*, *Gloucester* and *Hereford*, subject to other mortgages, did, by his will, dated the 21st of *May*, 1707, devise all his manors, messuages, lands and hereditaments to his only son *Lytton Lytton*, and the Heirs male of his body; remainder to his Godson *Strode Bedingfield* for life; remainder to his first and other sons in tail male, upon condition, that the said *Strode Bedingfield* and his issue male, should change his name of *Bedingfield* to *Strode*, and take the arms of the *Strodes*. And in case the said *Strode Bedingfield*, or any son of his should refuse or neglect to change his surname from *Bedingfield* to *Strode*, then the testator's will was, that the said devise should be void; and in such case, he gave the

the same to his Godson *George Darnelly* for life; remainder to his first and other sons in tail male; he and they changing their surnames in the same manner as *Strode Bedingfield* was to do: And in case he and his issue should refuse, then the devise to him and them was to be void; and in such case the testator devised the same to his own right heirs.

The testator soon afterwards died, and his son *Lytton Lytton* became seised of the mortgaged premises in *Sussex* as tenant in tail, subject to the said mortgages of 1100*l.* and 500*l.* And he also became seised of the reversion in fee of the same premises as the only son and heir of Sir *George* his father, subject to the several intermediate remainders before mentioned. And the said *Lytton Lytton* being also seised of several other real estates of considerable yearly value, and having no issue at the time of executing his will, and entertaining a great kindness for the respondent *William Robinson Lytton*, who was his near relation, made his will, dated the 16th of *April*, 1710, and thereby gave to his mother Dame *Margaret Strode* 2000*l.*; and after giving several other pecuniary legacies, he directed and appointed, that his executrix should, within six months after his decease, pay off and discharge all mortgages and incumbrances charged upon his estate in *Sussex* by his father Sir *George Strode*, viz. one mortgage of 1100*l.* to Mr. *Brook*, and one other mortgage of 500*l.* to Mrs. *Seyliard*; and that the said several mortgage leases should be kept on foot; and, upon payment of the money due thereon, should be assigned by the mortgagees to his mother Dame *Margaret Strode*, for her sole use and benefit, during the remainder of the several terms in the said mortgages contained.

And he gave to his said mother Dame *Margaret Strode*, a yearly rent-charge of 100*l.* for her life, to be issuing out of all his manors and lands in the counties of *Hertford* and *Bedford*: — And to his wife *Bridget Lytton* a yearly rent-charge of 500*l.* to be issuing out of all his manors and lands in the counties of *Hertford* and *Bedford*, for her life. — And as for and concerning all and every his manors, messuages, lands, tenements and hereditaments, which he was then seised of in law or equity, or which he had a power to give or charge, he gave and disposed of the same in manner following, viz. if his wife should be with child at the time of his decease, then he gave

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gave all his said manors, messuages, lands, tenements and hereditaments, to his cousin the respondent *William Robinson Lytton*, until such child should be born; and after the birth of such child, if it should prove a son, he devised all his said manors, messuages, lands, tenements and hereditaments, to his said after-born son, and to the heirs male of his body; the remainder to his said cousin the respondent *William Robinson Lytton*, and his heirs. And in case of the birth of such son, then he devised a rent-charge of 200*l.* a year issuing and to be paid by his said son, out of the said manors and lands unto the said respondent and his heirs, with a power of distress in case of non-payment. But if the said after-born child proved a daughter, then he gave to such daughter 5000*l.* to be raised and paid out of the rents and profits of the said estate, at the age of 18, or marriage. And if his wife should not be with child at his death, then he gave all his said manors, messuages, lands, tenements and hereditaments, to his said cousin the respondent *William Robinson Lytton*, and his heirs. — The testator then ordered his executrix to pay all his father *Sir George Strode's* just debts; and gave the residue of his personal estate, after his debts, legacies and funeral expences were paid, to his said wife *Bridget Lytton*, whom he appointed sole executrix of his will. And he appointed that all his furniture, goods and household-stuff, then being in his manor seat at *Knebworth*, should remain and continue in his said house after his death, for the use and benefit of the said respondent, to whom he thereby gave the same.

The testator *Lytton Lytton* soon after died without issue; and immediately after his death, *Strode Bedingfield* entered upon the premises in *Suffex*, comprised in the mortgages to *Brook* and *Seyliard*, and complied with the condition in *Sir George Strode's* will, by taking the surname and arms of *Strode*; and in *Michaelmas* term, 1710, brought his bill in the Court of Chancery, against Dame *Margaret Strode* and *Bridget Lytton* the executrix, and the respondent *William Robinson Lytton*, and also against *Brook* and *Seyliard* the mortgagees, and Dame *Ann Bedingfield* and *Elizabeth Bedingfield* the heirs at law of *Sir George Strode*, to redeem the mortgaged premises: The several defendants having put in their answers to that bill, the cause was heard before the Lord Chancellor *Harcourt*, on the 22d of *Februcry*, 1712, when it was, *inter alia*, decreed, that the monies due to

Brook and *Seyliard* on their respective mortgages for principal and interest, together with their costs, should be paid out of the assets of *Lytton Lytton*; and that *Brook* and *Seyliard*, on payment thereof, should assign their respective mortgages to *Dame Margaret Strode*, or to whom she should appoint, in order to secure to her what principal and interest was due thereon at the death of *Lytton Lytton*, together with all other interest which should grow due from that time; but the same was to be subject to a redemption by the said *Strode Strode*; and therefore, if *Strode Strode* should pay to *Dame Margaret Strode*, the principal and interest due on the said mortgages at the death of *Lytton Lytton*, with all such interest as should become due for the same, at such time and place as the Master, to whom the account was referred, should appoint; and no assignment should have been made of the said mortgages to *Dame Margaret Strode*; then *Brook* and *Seyliard*, being first paid their said principal, interest and costs, out of *Lytton Lytton's* assets as aforesaid, were at *Strode Strode's* charge, to assign the said mortgages to him, or as he should appoint; but such assignment was to be subject to such further direction as the Court should think fit to make, when proper parties should be before the Court.

Pursuant to this decree, by indenture dated the 21st of July, 1713, *Francis Brook*, in consideration of 1253*l.* 1*s.* (being the money reported due to him for principal, interest and costs) paid to him by the respondent *William Robinson Lytton*, who had purchased of *Bridget Lytton* the benefit of *Lytton Lytton's* personal estate, assigned to the appellant (who, pending that suit, had married *Dame Margaret Strode*) the premises mortgaged to the said *Brook*, for the remainder of the said two terms of 1000 years; subject to a condition, that if *Strode Strode*, or such other persons as should be entitled to the inheritance of the premises under *Sir George Strode's* will, should pay to the appellant 1100*l.* and interest at a day therein mentioned; then the appellant should assign the premises to such person as *Strode Strode*, or such other person so entitled as aforesaid, should appoint, for the residue of the said terms; but such assignment was to be subject to such further directions as the Court should think fit to make touching the remainder of the said terms, when proper parties should be before the Court.

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And by indenture dated the 28th of *April*, 1714, the appellant in consideration of 1100*l.* paid to him by the respondent *Mascall* and *Joseph Meal*, since deceased, assigned the same premises to *Mascall* and *Meal* for the remainder of the said terms, subject to redemption, and subject to the like further directions of the Court.

And by another indenture dated the 1st of *August*, 1713, *Mary Seyliard*, in consideration of 558*l.* 4*s.* 9*d.* (being the sum reported due to her for principal, interest and costs) paid also by the respondent *William Robinson Lytton*, assigned to the appellant the premises mortgaged to her for the remainder of her term of 1000 years, subject to the like redemption as aforesaid, and to the like further directions of the Court. And by indenture dated the 28th of *April*, 1714, the appellant, in consideration of 500*l.* paid to him by the respondent *Bedingfield*, assigned the same mortgaged premises to *Bedingfield* for the remainder of the said term, subject to redemption, and to the like further directions of the Court, as in the foregoing assignments. — But the respondent *William Robinson Lytton* did not join in the execution of any of these assignments.

In *December*, 1715, Dame *Margaret Strode* died; upon whose death, the appellant her husband obtained letters of administration with her will annexed; by which will, she gave the residue of her estate to the appellant.

In *May*, 1725, *Strode Strode* died without issue; and upon his death, the reversion and inheritance of the mortgaged premises did, by virtue of the will of *Lytton Lytton*, come to the respondent *William Robinson Lytton*; subject to the said mortgages made by Sir *George Strode* to *Brook* and *Seyliard*, and afterwards assigned to the other respondents *Mascall* and *Bedingfield* as aforesaid.

In *Michaelmas* term, 1725, the appellant exhibited his bill in the Court of Chancery, against the now respondents and *George Darnelly*; praying, that the respondents *Mascall* and *Bedingfield* might receive what was due to them for principal and interest on the said mortgages, and reassign the mortgaged premises to the appellant; and that he might hold and enjoy the same for the remainder of the said several terms of 1000 years.

To which bill the several respondents put in their answers; and the respondent *Lytton* by his answer insisted, that he was well entitled under the will of *Lytton Lytton* to the said mortgaged premises, subject to the monies due thereon, and hoped he should be at liberty to redeem the same.

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In *Easter* term 1726, the respondent *Lytton* exhibited his cross bill against the appellant and *George Darnelly* and the other respondents, to redeem the said mortgaged premises, upon payment of the principal and interest due on the said mortgages, and to be quieted in the possession of the premises.

Both these causes were heard on the 13th of *November*, 1727, before the Lord Chancellor *King*; when his Lordship was pleased to order, that the Judges of the King's Bench should be attended with a case upon the will of Sir *George Strode*, for their opinion, Whether *George Darnelly*, alias *Strode*, upon the death of *Strode Strode*, became entitled to the said estate by Sir *George Strode's* will? And after the Judges had given their opinion, either party was at liberty to resort back to the Court for further directions.

The Judges of the King's Bench accordingly certified their opinion, that *George Darnelly* could not take any estate after the death of *Strode Strode*, by virtue of Sir *George Strode's* will; the said *Strode Strode* having during his life, taken upon him the surname of *Strode*, and in every other respect complied with the will of Sir *George Strode*.

On the 3d and 4th of *March*, 1728, the causes were heard upon this certificate, and the matters reserved by the former decree; when the Lord Chancellor was pleased to declare, that *George Darnelly* did not take any estate by the will of Sir *George Strode*; and decreed, that an account should be taken of what was due for principal, interest and costs, to the respondents *Masfall* and *Bedingfield* on the said several mortgages; and that upon payment thereof by the appellant, the said respondents should, at the appellant's costs, assign to him, or as he should appoint, the said respective mortgaged terms; but in default of payment by the appellant, his bill should be dismissed with costs. And as between the appellant and the respondent *Lytton*, it was decreed, that the appellant should hold the mortgaged premises absolutely

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absolutely against the said respondent and his heirs, and all claiming under him; and that the tenants should pay the rents of the mortgaged premises, accrued since the death of *Strode Strode* to the appellant, and that the said respondent's cross bill should be dismissed.

The respondent *Lytton*, conceiving himself aggrieved by this decree, obtained an order for rehearing the causes; and the same being reheard accordingly on the 25th of *October*, 1729, his Lordship was pleased to declare his opinion in favour of the respondent *Lytton* against the former decree; but offered the appellant, if he desired it, to rehear the causes again, assisted with two of the Judges, which the appellant desiring, it was ordered, that the said causes should come on again to be reheard on that day fortnight.

Accordingly, the causes came on again to be reheard on the 8th of *November* following before his Lordship, assisted by the Lord Chief Justice *Raymond* and Mr. Justice *Denton*; when his Lordship and the Judges were all unanimously of opinion, and did declare, that the respondent *Lytton* was entitled to the equity of redemption of the said several mortgages and mortgaged premises; and therefore his Lordship reversed his former decree in that point, and decreed, that an account should be taken by the Master of what was due to the respondents *Masfall* and *Bedingfield* for principal, interest and costs, on the said mortgages; and upon payment thereof by the respondent *Lytton*, the other respondents should, at his costs, assign those mortgage terms to him, or as he should appoint; and in default thereof, his cross bill was to be dismissed. — And as between the appellant and the respondent *Lytton*, it was decreed, that the said respondent should hold the mortgaged premises absolutely against the appellant, his executors and administrators, and all claiming under Dame *Margaret Strode* deceased: And that the tenants should pay the rents of the mortgaged premises, accrued since the death of *Strode Strode*, to the respondent *Lytton*; and the appellant having received some of the rents, he was decreed to account for the same before the Master, and to pay what should be reported due from him to the said respondent *Lytton*; and the appellant's original bill was dismissed.

Cases in Parliament.

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The appellant therefore, appealed from this last decree; insisting, that the testator *Lytton* having the remainder in fee of the estate in *Suffex*, which was mortgaged, he had undoubtedly a power to dispose of the 1000 years term, and the equity of redemption thereof absolutely against every one, except *Strode Bedingfield*, who had an estate for life by the will of Sir *George Strode*, and, except the contingent remainders created by the same will, if they had happened to take place, which they did not. That as *Lytton* had such power, he had by plain and express words, given these terms for years to his mother Dame *Margaret Strode* absolutely, and without any condition, or subject to any redemption, so far as he had power; for he directed, that his executrix should pay off and discharge all mortgages and incumbrances upon his estate in *Suffex*, charged by his father Sir *George Strode*; and that the several mortgage leases should be kept on foot and be assigned to his said mother, *for her sole use and benefit, during the remainder of the several terms in the said mortgages contained.* That in case the general devise to the respondent *Lytton* and his heirs, might be sufficient to include the premises in *Suffex*, by virtue of the general words, tho' not expressly mentioned; yet it was apprehended, that both devises of the same premises being consistent, they ought both to stand; and that accordingly, the appellant was entitled to the terms of years absolutely, and the respondent *Lytton* only to the reversion in fee of the premises comprised in those terms; he having, by the same will, a very large estate given to him in possession in other counties. That the appellant and the respondent *Lytton* both derived their respective titles to the premises in *Suffex* under the same will, as *voluntary devisees*; and therefore it was highly reasonable, that the will should be construed in such a manner, as that an express and particular devise of lands, fully and plainly ascertained and described, should not be defeated or invalidated by a general indefinite clause.

C. Talbot.

T. Lutwyche.

But it is objected, that the devise of these terms to Dame *Margaret Strode*, is too remote a limitation of an estate or interest of that nature, and therefore void. To this it may be answered, that here is no devise or limitation of any term in tail, or any tendency to a perpetuity, but only a devise of these terms for years, which were capable of being disposed of by will,

Cases in Parliament.

according to the interest which the testator had in them; and tho' *Strode Strode* had such an interest for his life, that he might redeem them by virtue of the will of Sir George *Strode*, in respect of such interest, yet subject thereto, they were well devised to Dame *Margaret*, her executors and administrators.— It is also objected, that by the decree in the former cause, the Court did in effect determine, that Dame *Margaret* was entitled to the terms, only as a security for the mortgage monies, by decreeing a redemption to *Strode Strode*. But to this it is answered, that *Strode Strode's* title arising under the will of Sir George, the testator *Lytton* could not deprive him of his right of redemption, in respect of his estate for life; but the respondent, claiming under the will of *Lytton* only, could have no greater interest than was given him by that will; and by the old decree, before *Strode Strode* could redeem the mortgages, so as to have the terms attendant upon his estate for life, he was ordered to pay Dame *Margaret* the several sums advanced for her benefit out of the assets of the testator *Lytton*, and applied in discharging those mortgages; but this was not decreed to her in lieu and satisfaction of all her interest in the terms, and therefore the assignments to be made, were to be subject to the further direction of the Court, and such assignments were drawn accordingly. But where the Court intended, that another mortgage, which was to one *Bridges* upon another estate, should attend the inheritance, it was expressly so ordered by the decree. It was therefore prayed, that the said decree of the 8th of November, 1729, might be reversed, and the former decree of the 4th of March, 1728, affirmed.

J. Wood.

On behalf of the respondents *Mascall* and *Bedingfield*, it was hoped, that as they were no way interested in the question between the appellant and the respondent *Lytton*, touching the right of redemption, and had, by their answers to both bills, submitted to accept their principal, interest and costs, from such of the parties as had a right to redeem them; that whether they should be decreed to assign their mortgage terms to the appellant, or the respondent *Lytton*, they should, upon such assignment, be paid not only their principal and interest, together with their costs in the Court of Chancery, but also their costs occasioned by this appeal.

And

And on the part of the respondent *Lytton* it was argued, that the testator *Lytton* did not intend to give Dame *Margaret Strode* the absolute interest in the terms; but only to give her the same as a security for the money due upon those mortgages. And that this was his intention, appeared manifestly from the whole frame of the will, the devise to Dame *Margaret* of these mortgage terms, being amongst the pecuniary legacies, and before the devise of his lands; and when he came to devise his lands to the respondent *Lytton*, he described them by *all and every his manors, messuages, lands, tenements and hereditaments, which he was then seised of in law or equity, or which he had power to give*; which conveyed the lands in question to the respondent, in as plain and certain a manner, as if the testator had devised them by express words. That this intention was still the more evident, if it was considered, that the devise of his real estate to the respondent *Lytton*, was in the same words as the devise to the testator's own son, in case his wife had been with child of a son; and it could not be imagined, that the testator intended to give these lands from his own son to his mother. That no devise by the testator of these terms, but as mortgage interests, could possibly take effect till the determination of the estate to *Strode Strode*, and the estates tail to his sons, and the contingent estates limited to *George Darnelly* for life, and to his sons in tail; and it was hardly to be imagined, that it could ever enter into the thoughts of the testator, to give his mother a remote interest in lands, which she could never probably either enjoy or sell, only in order to sever such long terms of 1000 years from the inheritance of his estate, and that his mother might have the power of giving them away from his family to a stranger, as the fact had really happened. That the words of the devise in question, were proper to convey these terms as securities, and to put his mother in the place of the mortgagees, and such interest only they must necessarily be understood to pass, so long as any of the intermediate estates, precedent to the testator's reversion in fee, subsisted; and there was no reason to imagine, that the testator intended his words should have two different meanings. That as the decree now stood, Dame *Margaret*, under whom the appellant claimed, and who had a jointure besides of 400*l.* *per ann.* had, by the will of her son *Lytton*, legacies to the amount of 3600*l.* over and above a rent-charge of 100*l.* *per ann.* thereby

given

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given to her for her life; and which was very near as ample a provision as he designed for an only daughter, in case he had left one: But if the construction now contended for by the appellant should prevail, then he, in right of his wife, would receive out of *Lytton's* estate, four times as much as the provision made by the testator for an only daughter, which, it could never be imagined, he intended. But supposing it to be ever so plainly the testator's intent to devise the absolute interest in the terms to Dame *Margaret*, yet it was apprehended, such a devise could not take effect in point of law; because those terms, or (which was the same thing as to the present question) the equity of redemption of them, would then, at the testator's death, stand limited in the following manner, viz. in trust to attend the freehold and inheritance so long as the estate for life of *Strode Bedingfield*, the estates tail to his sons, and the contingent estates for life and in tail of *George Darnelly* and his sons should last; and the residue, after all those estates spent, not to attend the inheritance, but to be for the benefit of Dame *Margaret*, her executors and administrators, as terms in gross. But it was conceived, that such a devise of the remainder of terms after estates tail was void, as being too remote, when separate from, and not attendant upon the inheritance. It was therefore hoped, that the last decree would be affirmed, and the appeal dismissed with costs.

DECREE
affirmed,
JOUR. VOL. 23.
P. 503.

AND accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed: And it was further ORDERED, that the appellant should pay to the respondents *Masfall* and *Bedingfield*, 5*l.* for their costs in respect of the said appeal.

Roger

Roger Lynch and John Lynch, Appellants. Case 71.

Robert Dalzel, Henry Cartwright and John Everett, Esqrs. Respondents.

13th March, 1729.

ABOUT the year 1709, some persons observing, that great benefit accrued to the public by insurances made in the cities of London and Westminster against losses of houses by fire, but that such insurances did not extend to other parts of England, nor were there any insurances against losses of goods by fire, they formed a society for that purpose, which was called the *Sun Fire-office*; and the undertaking was, from that time, so successfully carried on, that hundreds of families have been thereby saved from ruin.

The Society being sensible, that such an extensive undertaking might give great opportunities for frauds, took all possible precaution for preventing them; and therefore, their policies for insurance were so framed, as to be contracts only between the office and the persons insuring; the loss secured against, being thereby restrained and confined to the contracting persons only; and the policies referred to certain printed proposals, containing the essential terms and conditions between the insurers and the insured; copies of which proposals were always delivered with the policies.

By these proposals, the office insured houses, warehouses, goods, wares and merchandize, except some particular things therein specified. And altho' it is essential to insurances, that the persons insuring should have a property in the things lost, yet, to prevent all disputes, as goods and merchandize are fleeting commodities, and frequently changed from one hand to another; there is an express exception in the proposals, of goods and merchandize, not being the property of the persons insured. And, that the property may more fully appear to be at the time of the loss in the person insured, it is prescribed and stipulated as a fundamental condition of every insurance, that the person insured, in case of loss, shall make affidavit of his

loss, and procure a certificate from the minister, churchwardens and substantial neighbouring inhabitants, that they know or verily believe, that the sufferer has really sustained such loss; and on producing such affidavit and certificate, the insured is to receive satisfaction according to the proposals; but if any fraud or perjury should appear, the sufferer is to be excluded from all benefit of the policy. And as the contract was plainly restrained to the person insured, it was provided by a particular article, that the policy and interest of the person insured should continue to his executors and administrators, upon the terms therein mentioned.

On the 28th of July, 1721, one *Richard Ireland* took out from the office a policy of insurance, whereby it was witnessed, that whereas the said *Ireland* had agreed to pay, or cause to be paid to the said office, the sum of five shillings within fifteen days after every quarter day, for the insurance of his house, being the *Angel Inn* at *Gravesend*, with his goods and merchandize, as therein after expressed only, and not elsewhere, viz. the dwelling house not exceeding 400*l.* and for the goods in the same only, not exceeding 500*l.* and for the stable only, not exceeding 100*l.* all then occupied by *James Peck*, from loss and damage by fire; then so long as the said *Richard Ireland* should duly pay or cause to be paid five shillings a quarter, as therein mentioned, the said Society did bind themselves, their heirs, executors, administrators and assigns, to pay and satisfy the said *Ireland*, his executors, administrators and assigns, within fifteen days after every quarter day, in which he should suffer by fire, his loss not exceeding 1000*l.* according to the exact tenor of their printed proposals: Which policy was dated the 28th of July, 1721, and subscribed and sealed by three of the trustees for the Society.

Some considerable time afterwards, *Richard Ireland* died, having made his will, and *Anthony* his son sole executor; who brought the policy to the office, and had an indorsement made thereon, that the same then belonged to him: And afterwards, viz. at or about *Christmas*, 1726, he, the said *Anthony*, paid the office a premium of twenty shillings for one year's insurance, from *Christmas*, 1726, to *Christmas*, 1727, as by an article in the proposals he was at liberty to do.

Cases in Parliament.

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On the 24th of *August*, 1727, a fire happened at *Gravesend*, which (among many others) destroyed the house mentioned in the policy; and some time afterwards, the appellants applied to the office, and alledged, that they had purchased the house and goods of *Anthony Ireland*; that the same were their property at the time of the fire, and that they had an assignment of the policy made to them at the same time that the house and goods were assigned; and they produced an affidavit made by the appellant *Roger Lynch*, wherein he swore, that his loss and damage by burning the said house, amounted, at a moderate computation, to 500*l.* and upwards; and upon this affidavit was indorsed a certificate of the minister, churchwardens and other inhabitants of *Gravesend*, that they verily believed, according to the best of their information, the appellants *Roger* and *John Lynch* had sustained a loss of 500*l.* and upwards. But neither in the affidavit or certificate, was any mention made of any loss being sustained by the appellants by the burning of any goods in the said house; nor was any affidavit made by *Anthony Ireland*, in whom the property of the policy was, that he had suffered any loss.

The appellants, however, insisted that the office should pay them 1000*l.* for their loss sustained by the burning of the said house and goods; but the managers and trustees of the office, not thinking themselves liable to pay any thing on that account, and the appellants alledging that the policy was lost, the three respondents were, for the ease of the appellants and at their desire, appointed to defend any suit which should be prosecuted against the office on this occasion.

The appellants therefore, in *Easter* term, 1728, exhibited their bill in Chancery, setting forth, that *Anthony Ireland* agreed to sell and assign to the appellants the house, stables and goods, and also at the same time agreed to assign the policy; and that by indenture of the 24th of *June*, 1727, for 250*l.* *Ireland* did assign to the appellants a lease he had of the house and stables for the residue of a term of 70 years, which commenced at *Midsummer*, 16 *Car.* II. but the goods, for which the appellants, as they alledged, were to pay 500*l.* being intended for one *Thomas Church*, who was to hold the inn under the appellants, *Ireland*, by deed poll of the same date, sold the same to *Church* for his own use. The bill also stated, that by another writing
of

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of equal date, *Ireland* assigned the policy, and all money and benefit thereof, to the appellants.—That altho' the bill of sale of the household goods was made to *Church*, yet, as the appellants paid the purchase money for the same, *Church* assigned his bill of sale to them, for securing the money they had paid for the goods; and afterwards, by another writing, released to the appellants his benefit and interest in the policy.—That the appellants had applied to the office for the 1000*l.* loss, which was refused; and therefore the bill prayed to have a satisfaction for the loss they had sustained, according to the policy.

The respondents put in their answer, and then the appellants amended their bill, and the respondents put in another answer.—By these answers, the respondents set forth the nature and method of the insurances made by the office, and admitted the policy in question, and the appellants application for the 1000*l.* loss; but said, that the affidavit produced was not agreeable to the proposals, and that they had been informed and believed, that no assignment of the policy was made to the appellants, nor any assignment of goods made to them by *Church*, till after the fire. They insisted, that the policies issued by the office were not, in their nature, assignable, the same being only contracts to make good the loss which the contracting person himself should sustain; and that the policy in question was, at first, made with *Richard Ireland*, to pay his loss, not exceeding 1000*l.* and was afterwards declared, by indorsement, to belong to *Anthony Ireland*, and that no other person was entitled to the benefit of it.

The cause proceeded to issue, and witnesses were examined on both sides; and, upon the appellants own evidence it appeared, that the first discourse between the appellants and *Mr. Ireland* about the policy, was after the execution of the assignment of the house; and that the agreement (if there was any) about the policy was not, at the time when the appellants agreed to purchase *Ireland's* term in the house. It appeared further, that the assignment of the policy, tho' bearing date before, was not made and executed till some time after the fire; so that the agreement for assigning the policy, was a voluntary concession of *Ireland*, without any consideration, and independent of the bargain for the house, and never made till after

Ireland's

Ireland's interest in the policy, as to the house, was determined by his selling his interest in the thing insured, and not carried into execution till the thing itself was lost: And as to the appellants property in the goods, they proved an assignment from *Church* to them, as a security for 300*l.* but omitted in their interrogatories the material question to their witnesses, *viz.* When that assignment was made? Though the respondents by their answer put the time plainly in issue, by insisting that it was after the fire; and it did not appear that the appellants ever had any property in the goods.

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The respondents on their part proved, that the office did not insure any persons longer than they continued their property in the things insured; and, that persons dealing with them might not be mistaken, such notice was usually given.

On the 24th of *November*, 1729, the cause was heard before the Lord Chancellor *King*; when upon a full debate, and hearing the evidence on both sides, his Lordship was pleased to dismiss the bill: And the respondents, being willing to be easy with the appellants, did not insist on costs; and therefore the dismissal was ordered without costs.

But notwithstanding this lenity, the appellants thought proper to appeal from the decree; insisting, that the quarterly payments were made by *Anthony Ireland*, and accepted by the company, for the insurance of the said house and stables to *Christmas*, 1727, that the appellants were *bona fide* purchasers thereof, together with the benefit of the policy, before *Christmas*, 1727, and that by taking an assignment of the lease, they became liable to rebuild the premises, and which had cost them above 1000*l.* That the policy was actually delivered, and agreed to be assigned to the appellants by *Ireland*, on the 24th of *June*, 1727, upon their paying him the whole purchase money; and therefore the appellants from that time became entitled to the benefit of the policy, although the assignment thereof was not in fact executed until after the fire happened. That the appellants never saw any printed proposals, mentioning that the insurance was not to be extended where the property was altered, without the consent of the office; and what was urged by the respondents as to persons removing their habitations, could relate only to an insurance upon goods, which

P. Yorke.

C. Talbot.

the appellants did not now insist upon, because the goods were not assigned to them. But the house and stables being described and specifically insured by the policy, and the appellants becoming the proprietors thereof, before the expiration of the time for which the quarterly payments were made; they were entitled to have a satisfaction for the loss which they had sustained by the fire, to the full extent of the policy, viz. 400*l.* for the house, and 100*l.* for the stables.

J. Willes.

W. Hamilton.

On the other side it was argued, that these policies were not insurances of the specific things mentioned to be insured, for no body could warrant against accidents; nor did such insurances attach on the realty, or in any manner go with the same as incident thereto, by any conveyance or assignment; but they were only special agreements with the persons insuring, against such loss or damage as they should sustain. That the party insuring, must have a property at the time of the loss, or he could sustain no loss, and consequently be entitled to no satisfaction; and that this construction manifestly appeared from the whole tenor of the proposals. That there was no contract or agreement ever made between the office and the appellants, for any insurance on the premises in question. That not only the express words, but the end and design of the contract with *Ireland*, did, in case of any loss, limit and restrain the satisfaction to such loss as should be sustained by *Richard Ireland* only; and the indorsement on the policy, declared that right to his executor *Anthony Ireland* only. That these policies were not in the nature of them assignable, nor was the interest in them ever intended to be transferrable from one to another, without the express consent of the office. That the transactions in the present case, by changing the property backwards and forwards, and rendering it uncertain whose the true property was, manifestly shewed a designed imposition; and fully justified the caution which the office had taken to prevent the policies from being assignable, without the special consent and concurrence of the managers; which method is pursued by all the insurance offices, who are equally strict and careful in this respect. Lastly, that the appellants claim was at best founded only upon an assignment never agreed for till the person insured had determined his interest in the policy, by parting with his whole property, and never executed till the loss had actually happened:

Cases in Parliament.

And therefore it was hoped, that the decree would be affirmed, and the appeal dismissed with costs.

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ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

DECREE
affirmed.
Jour. vol. 23.
P. 505.

Alexander Small, Administrator of *Mary* }
his late Wife, who was the only }
daughter of *Peter Wing* the elder, } Appellant.
deceased, - - - }

Case 72.

Richard Wing, second Son and surviving }
Executor of the said *Peter Wing* the }
elder, and also Executor of *Peter* } Respondents.
Wing the younger, and *John Wing*, }
the youngest Son of the said *Peter* }
Wing the elder, - - - }

16th April, 1730.

PETER Wing the elder, on the 23d of *August*, 1695, made his will, and thereby gave to his eldest son *Peter Wing* the younger, all his interest in the brewhouse, utensils and stock in trade therein mentioned, and also the rectory of *North Stoake*; and directed, that *Peter* the son, during the term he should hold the said brewhouse, being then about four years to come, should pay to the executors of the testator 250*l. per ann.* The testator then devised to his executors all the rents, issues and profits, of all his other messuages or tenements, rectories, lands and hereditaments, therein after mentioned and devised; in trust that they should therewith, and with the said 250*l. per ann.* raise and pay all the testator's debts: But if his executors should neglect or refuse to receive and pay the said 250*l. per ann.* or the profits of the said premisses, or should receive and not duly apply the same towards payment of his debts; then the power thereby given them to receive and pay the same should cease: And then he appointed *Robert* and *Peter Sayer*, *Robert Dorrell*,
and

1730.

and *Richard Spooner*, to be his trustees to receive the said 250*l.* per ann. and the profits of the said messuages and premises, for the payment of his debts, until the same, and the legacies thereby bequeathed to his daughter *Mary*, the appellant's late wife, should be fully raised and satisfied.

The testator then gave to the respondent *Richard Wing*, his heirs, executors and assigns, the rectory of *North Morton*, and all his other messuages, lands and hereditaments, in *North Morton* and *South Morton*, subject to the payment of 25*l.* per ann. to *Mary* the testator's wife, during her life, to commence after the payment of the testator's debts. — And he gave to the respondent *John Wing*, his heirs, executors and assigns, the messuage and malt houses then in the testator's possession, and all other his messuages, lands and hereditaments, in *Brightwell*, *Mackney* and *Wallingford*; and declared it to be his will and meaning, that neither of his said sons, *Peter*, *Richard*, or *John*, should enter on or receive to their own use, the rents and profits of the premises to them respectively devised, or any part thereof, until all the testator's debts should be paid; save that his said son *Peter* should enjoy the brewhouse to his own use, paying the said 250*l.* per ann. as aforesaid; but that when and so soon as all his debts should be paid, and 1000*l.* to the appellant's late wife which he thereby gave to her, to be also raised and paid out of the rents and profits of the estates devised to his said three sons as aforesaid, should be fully paid and satisfied; (which said 1000*l.* over and above 1000*l.* the reinafter mentioned, the testator thereby charged to be raised and paid to his said daughter for and towards her portion, out of the rents, issues and profits of the estates before given to his said three sons) his said three sons might enter upon and enjoy the estates so to them devised as aforesaid, and not before. And to the end, that the 1000*l.* thereby given to his said daughter, should be raised and paid to her according to his will; he appointed his said trustees to receive the rents, issues and profits, of the premises so devised to his said three sons severally as aforesaid, and to pay over the same to his said daughter; and that until his debts and the said 1000*l.* should be paid, his trustees should let and set the premises for the best rents, for raising and paying his debts and the said legacy of 1000*l.* Provided, that if either or any of his said sons, should raise and pay such sums as the trustees, or the survivor, should
adjudge

adjudge to be his or their proportion of the debts and legacies, then the premises to him or them devised should be exempted; and such son or sons should enter and receive the profits: And the testator appointed his said wife and the respondent *Richard* to be his executors, and bequeathed to them all his personal estate, and directed, that they should thereout raise and pay to his said daughter, the further sum of 1000*l.* over and above the said other sum of 1000*l.* to be paid to her by his said executors, after his debts should be paid, *but not before*; it being his will, that his said executors and his said son *John* and daughter *Mary*, should live together in the house and malthouse wherein the testator then lived: And he directed, that his executors should provide all necessaries for his said son and daughter, until his debts should be paid.

On the 30th of *April*, 1696, the testator died; whereupon his executors proved his will, and the respondent *Richard* possessed his personal estate, and received the said 250*l.* *per ann.* from his brother *Peter* for four years; and the said *Peter*, the son, entered on the estates to him devised, and *Richard* entered on the residue of the real estates and received the profits thereof.

In *July*, 1706, the appellant intermarried with the said *Mary* his late wife, whereby he became entitled to the said two legacies of 1000*l.* each, with interest; but the testator's widow and sons refusing to pay the same, the appellant and his said wife, in *Hilary* term, 1706, exhibited their bill in the Court of Chancery, against the said *Mary Wing*, *Peter Wing* the son, and the respondents, to have an account of the testator's real and personal estates, and that the said legacies of 1000*l.* and 1000*l.* with interest, might be raised and paid. The several defendants put in their answers to this bill; and *Peter* the son afterwards dying, the suit was revived against the respondent *Richard*, as his executor; but, before the cause was heard, the appellant's wife died, leaving two daughters, and he having taken out administration to his said wife, became entitled to the said legacies of 1000*l.* and 1000*l.* and interest, and afterwards revived the suit.

On the 1st of *June*, 1715, the cause was heard before the then Master of the Rolls; who declared the will of *Peter* the father to be well proved, and that *Peter* the son came in as a

1730. purchaser of the brewhouse, upon his paying the 250*l.* for four years. And it was decreed, that the Master should take an account of the personal estate of the said *Peter Wing* the father, and of the said 250*l. per ann.* for four years, and of the profits of the estates devised to the sons, subject to the payment of the testator's debts; and also an account of the testator's debts and legacies, and state what the same severally amounted to. And the Master was to tax all parties their costs of suit, which were to be paid them out of the testator's estate: But the consideration of interest for the legacies devised to the appellant's late wife, and touching her maintenance and a sale of the estates subjected to the payment of the said debts and legacies, in case there should not be other assets sufficient to pay the same, and all other proper directions were reserved, until after the Master should have made his report.

The Master, on the 22d of *July*, 1720, made his report, and thereby certified, that the testator's personal estate amounted to 1233*l. 1*s.** and that he thought fit to charge the respondent *Richard* therewith, and also with 1000*l.* by him received of his brother *Peter*, and which he was to pay at four yearly payments as aforesaid: That the rents of the testator's real estate received by the respondents from *Lady-day*, 1696, to *Lady-day*, 1718, being above 600*l. per ann.* amounted to 11042*l. 3*s.** of which the respondent *Richard* had received 9850*l. 3*s.** and the respondent *John* 1192*l.* which sum of 9850*l. 3*s.** received by the respondent *Richard*, being added to the amount of the personal estate, and to the 1000*l.* received by him of his brother *Peter*, amounted in the whole to 12083*l. 4*s.** That the testator's debts, at his death, amounted to 7189*l. 9*s.* 5*d.** and that the respondents had paid in discharge of several of those debts, and the interest thereof, and for repairs, taxes, and maintaining the testator's family to *Lady-day*, 1718, and for the maintenance of the appellant's late wife, until her marriage, 12734*l. 16*s.* 4*d.** whereof he had allowed 11881*l. 19*s.* 11*d.* $\frac{1}{2}$* to the respondent *Richard*, and the remainder being 852*l. 16*s.* 4*d.* $\frac{1}{2}$* to the respondent *John*; so that there remained in the respondent *Richard*'s hands at *Lady-day*, 1718, 201*l. 4*s.* 0*d.* $\frac{1}{2}$* and in the respondent *John*'s hands 339*l. 3*s.* 7*d.* $\frac{1}{2}$* . That the appellant intermarried with his late wife on the 12th of *July*, 1706; that the said legacies of 1000*l.* a-piece remained unpaid, and that there also remained unpaid to the testator's creditors 3026*l.*

That

That *Peter* the son had been let into possession of the *North-Stoake* estate by the trustees, and had received out of the rents thereof from *Lady-day*, 1696, to the time of his death in *June*, 1711, 2625*l.* That the respondent *John* had been in possession of the estate devised to him, being 114*l.* per ann. ever since *Lady-day*, 1708. That the respondent *Richard* had paid 377*l.* 19*s.* 2*d.* for interest of monies borrowed by him to pay off the testator's most pressing creditors, and of which he craved an allowance; but the Master did not think fit to determine whether the same ought to be allowed. He however gave the respondents credit (among other allowances) for 300*l.* as the amount of ten years maintenance of the appellant's late wife prior to her marriage.

The respondents having taken exceptions to this report; and particularly, for that the Master had not allowed the 377*l.* 19*s.* 2*d.* upon arguing the same before the Lord Chancellor on the 16th of *January*, 1720, they were all over-ruled or waived; and it was ordered, that the report should stand absolutely confirmed, and that the respondent *Richard* should bring the 201*l.* 4*s.* 0*d.* and the respondent *John* the 339*l.* 3*s.* 7*d.* before the Master, subject to further order. And on the 8th of *March* following, another order was made by the Lord Chancellor, that the Master should appoint a receiver of the rents and profits of the premises, and allow him a salary.

On the 15th of *May*, 1721, the cause was heard upon the report before the Master of the Rolls, when the respondents made default; and it was then decreed, that the Master should compute what was due to the appellant for the two legacies of 1000*l.* and 1000*l.* and interest for the same, from the end of one year next after the testator's death, and tax the appellant his costs, according to the former decree; and that the defendants should bring all the deeds and writings relating to the testator's estates before the Master upon oath; and that he should examine what part of the testator's real estate was necessary and sufficient to be sold, for raising what should be found due to the appellant for the said legacies, interest and costs, after a deduction of what was certified in the report to have been paid for the maintenance of the appellant's wife; and that the same should be accordingly sold to the best purchaser, to be allowed of by the

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the Master, and that all parties should join in such sale, as the Master should direct.

On the 6th of *November* following, the cause upon the said report was reheard (on the respondent's application) by the Master of the Rolls, who then confirmed the last decree, with this further direction, that a sale should be made, as well of the testator's leasehold estate, as of his real estate, sufficient to pay his debts reported due, or such part thereof as then remained unpaid, together with what should be found due to the appellant for the legacies of 1000*l.* and 1000*l.* with interest as aforesaid at 5*l.* per cent. and the appellant's costs of suit.

From both these decrees the defendants appealed to the Lord Chancellor *Macclesfield*; and the cause standing in the paper to be heard upon the said appeal, on the 9th of *June*, 1722, his Lordship put it off, and recommended it to the parties to agree matters; and on the 30th of the same month, his Lordship again made the like recommendation, and ordered, that 200*l.* part of the money in the Master's hands, should be paid to the appellant on account, and the same was paid accordingly.

But the parties not being able to accommodate matters, the cause was fully heard upon the said appeal, on the 9th of *November*, 1723, when his Lordship was pleased to declare, that it appeared to be the testator's intent, that his debts and legacies should be raised out of the yearly rents and profits of the trust estate, without a sale of any part thereof, and that his debts should be satisfied before his legacies; and that therefore the legacies bequeathed to the appellant's late wife, not becoming due until after the testator's debts were or could be all paid, out of the yearly rents and profits of the trust estate, and there being no direction in the will for the said legacies carrying interest, but a provision made for the maintenance of the family in the mean time; his Lordship was of opinion, that the appellant was not entitled to have any interest for the said legacies; and therefore ordered, that the appellant's bill, so far as it sought a sale of the trust estate, or payment of interest for the said legacies, should stand dismissed.—But, as touching maintenance, his Lordship conceived that the appellant's late wife was entitled to her share of what, by the will, was allowed for the maintenance of the family, from the time she was maintain-

ed by the defendant, until her death; and such share or proportion of the maintenance being 30*l. per ann.* it was ordered, that the Master should see what the appellant had received, and what was due to him in respect thereof, and that the same should be paid to the appellant accordingly.—And as to the rents and profits of such part of the trust estate, as had been received by *Peter Wing* the son, and by him misapplied, his Lordship declared, that altho' such misapplication ought not to charge the trust estate devised to the respondents, with more than their share of the debts and legacies; yet, that the appellant and his late wife, who had been thereby injured by not having her said legacies raised sooner, were entitled to receive a compensation in respect thereof, out of the said *Peter* the son's estate, and in regard there might be a contest between the appellant and the other creditors of *Peter* the son, touching a priority of satisfaction, the appellant's being only in the nature of a debt by simple contract; his Lordship therefore ordered, that the Master should take an account of the assets of the said *Peter*, come to the hands of the respondent *Richard*, his administrator, and also an account of *Peter's* debts; and when the Master should have made his report thereon, his Lordship would give further directions, touching the priority of payment of the said debts out of *Peter's* assets, and the interest he had in the trust estate.—And as to the question, whether the respondent *Richard* should have an allowance of interest for what he had borrowed, or paid out of his pocket, towards satisfaction of his father's debts, his Lordship declared, that the said respondent had done well therein, he having therewith discharged debts which carried interest, and the estate profited thereby; and therefore ordered, that out of the rents of the said estate, he should be allowed interest for what he so borrowed, or paid out of his pocket, in satisfaction of his said father's debts, and that the money by him brought before the Master, as aforesaid, should be repaid him.—And as touching the costs of the suit, his Lordship declared, he saw no cause to give the appellant any costs; but that the respondent *Richard* ought to be allowed his costs out of the trust estate in the first place, and that the surplus of the said trust estate should be applied in the payment of the debts, and then the legacies of the father; but in regard the allowance of the said defendant's costs, would occasion a longer continuance of the term, to the appellant's and respondent's

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dent's prejudice, his Lordship therefore reserved the consideration, whether the respondent should have satisfaction over against the appellant, in respect of their costs.—And as to the 1000*l.* given to the appellant's late wife out of the personal estate, his Lordship declared, the appellant ought to have satisfaction for the same, in like manner as he was to have for the 1000*l.* charged on the trust estate; and it was further ordered, that the receiver of the trust estate should be discharged, the appellant then declining to bear the charge of a receiver for the future; and the consideration, who should bear the charge of the said receiver for the time past, was reserved.

C. Talbot.

D. Ryder.

The appellant conceiving himself aggrieved by this last decree, appealed from it; and on his behalf it was argued, that a legacy given, without mentioning the time of payment, is, according to the known rule of a Court of Equity in ordinary cases, to be paid at the end of a year after the testator's death, and to carry interest from that time; and where it is directed to be raised out of the rents and profits of an estate, such direction is generally held to give a power to sell or mortgage the estate for that purpose, and especially in the case of younger children's portions, when it becomes necessary to raise them for their advancement in the world: And if it should be thought that it was not the testator's intention in the present case, to have the legacies in question raised by sale or mortgage, yet it was apprehended, that as there was no time limited for the payment of the first 1000*l.* nor the payment of it postponed by the will, it ought not to have waited till payment of the debts, but be raised as soon as the profits would supply it, by which means equal justice would be done both to the creditors and legatee. The 1000*l.* might be raised in a reasonable time, from whence it ought to carry interest; and the creditors would not be prejudiced, because their debts would carry interest, and must, in the end, be paid out of the estate: And this was still stronger, because of the express direction in the will, to pay the rents and profits to the appellant's late wife, towards satisfying her legacy. And as to the other 1000*l.* legacy, which is more particularly mentioned to be payable out of the personal estate, that having been postponed by the payment of those debts to the creditors, it ought to stand in the place of the debts so paid, in order to its being satisfied out of the real estate, and

to carry interest in the mean time, as they did. But if both or either of the legacies ought to have been postponed to the debts, it appeared, by the Master's report, that the debts might have been paid much sooner, than the time of making the last decree, if the 2625*l.* received by *Peter* the son so long ago as the year 1711, had been applied to that purpose, according to the directions of the will; and considering how much interest might have been saved of the debts, which would have been paid off with that money, the whole debts, upon the nearest computation, might have been paid before the year 1718; and therefore, if any variation of the decree made by the Master of the Rolls had been reasonable, as to the time of payment of the legacies, it ought to have been by referring it to the Master, to state when the debts might have been paid, and ordering the legacies to carry interest from that time, and to be paid by the respondents, so far as they had received any overplus of the rents and profits; and as to the residue, by sale or mortgage of the trust estate, or at least of that part of it which was devised to *Peter* the son; and the allowance of an annual sum, in lieu of maintenance, ought to have been continued to the time of the commencement of the interest. That the respondent *Richard* ought not to be allowed, as against the appellant, interest for the money he advanced towards payment of his father's debts, because there was sufficient raised out of the rents to pay the principal; and if that was misapplied, it ought not to prejudice the appellant, and postpone the payment of his wife's legacy: Nor could there regularly be any such allowance ordered upon hearing the appeal, the same matter having been previously determined on the exceptions to the Master's report. That there was apprehended to be no foundation for discharging the receiver, since, in all events, the appellant was entitled to have the legacies out of the profits of the trust estates; and by the express directions of the will, the respondents and *Peter* the younger were not to enter upon those estates till those legacies, as well as the debts, were satisfied: And the rather, because in this case, the last decree did not so much as order the respondents to apply the growing rents either in payment of the debts or legacies, or in what other manner, or by whom such rents should be disposed of. That there was no reason why the appellant should bear the expence of a receiver, nor could his refusal to do so, be a sufficient ground for discharging the

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the receiver; neither did there appear to have been any reason for reserving the consideration of who should bear the expence of the receiver for the time past. That the appellant ought not to have been deprived of his costs, which, by the common course of a Court of Equity, he was entitled to; his suit being made necessary by the nature of the devise, and the misconduct of at least one of those entitled to part of the estate, out of which he was to receive a satisfaction for his demand; and much less could there be any reason for reserving the consideration, whether the respondents should have a satisfaction over against the appellant in respect of their costs. Besides, the question as to costs, was apprehended not to be open for the determination of the Court upon the appeal; because costs were given by the first decree at the Rolls, which was signed and inrolled long before the appeal to the Chancellor from the second decree. It was therefore hoped, that the decree of the Lord Chancellor would be reversed, and the second decree of the Master of the Rolls confirmed.

P. Yorke.

T. Lutwyche.

On the other side it was insisted, that tho' in some cases a sale has been decreed, where money has been devised generally to be raised out of the rents and profits of lands, yet, in the present case, it plainly appeared to be the intention of the testator, that none of his lands should be sold; he directing, that after his debts and legacies were paid, his sons should enter upon and hold the several estates devised to them; but which direction could not be complied with, in case any part of the estates should be sold: And the testator having also directed, that the 1000*l.* should be paid out of the rents, issues and profits *to be issuing* out of his lands so devised, he thereby declared his will, that the same should be paid out of the *annual* profits only. That the like intention appeared very clearly in that part of the will, where the testator declared in what manner his trustees, who were appointed to enter in default of his executors, should execute their trust; namely, that they should receive the rents and profits, and let and set the estate, until his debts and the legacy bequeathed to his daughter *Mary* should be paid. That as the debts were only payable out of the rents and profits of the estates, and as the legacies were directed to be paid after the debts, *but not before*; and as there was no direction for the payment of any interest for the legacies, but only a maintenance for *Mary*, until the debts were paid; the

testator

testator seemed to have substituted this maintenance in the place of interest, and therefore the appellant could not be entitled to both. As to the objection, that it was inconvenient for the appellant's wife to wait so long for her legacies, and that it would not answer the intent of a portion unless it could be raised in a reasonable time; it was insisted, that the testator's intention was such, and that he was pleased to lay equal, if not greater difficulties, upon all his sons, in not permitting them to enter upon the devised estates, until not only his debts but also his legacies were paid. And as to the allowance of 377*l.* 19*s.* 2*d.* for interest of what the respondent *Richard* had borrowed to pay his father's debts, it was said, that the money was so borrowed in order to satisfy some of the most importunate of the creditors, and who by expences in law would have subjected the estate to a greater burthen of costs; and therefore, as the estate had received the advantage, the respondent *Richard* was justly entitled to the allowance.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that so much of the first part of the decree complained of as declared, "that the testator's intent was, that his debts and legacies should be raised out of the yearly rents and profits of the trust estate, without sale of any part thereof, and that his debts should be satisfied before his legacies;" and that dismissed the appellant's bill, so far as the same sought a sale of the trust estate; should be affirmed: But as to so much of the first part of the said decree, which dismissed the bill so far as it sought payment of interest for the two legacies of 1000*l.* each, the same should be reversed. And it was further ORDERED, that the allowance of 30*l.* *per ann.* for the maintenance of the appellant's late wife, should be carried on from her death, till the time that the appellant should be entitled to interest for the said legacies; and that the same should be paid to him out of the rents and profits of the trust estate: And with respect to such interest, it was ORDERED, that it should be referred to the Master to enquire when and at what time the debts of the testator might have been paid or satisfied by his personal estate, and the 250*l.* *per ann.* payable by *Peter Wing* the son in respect of the brewhouse devised to him, and by perception of the profits of the trust estate, if the same had been duly applied; in making of which enquiry, the Master was to make all just allowances and deductions: And it was

DECREE
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P. 537.

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further ORDERED and ADJUDGED, that so much of the said decree as contained a declaration of the Court relating to the rents and profits received by *Peter Wing* the son, and ordered the Master to take an account of his assets; and also the declaration and order relating to an allowance of 377*l.* 19*s.* 2*d.* to the respondent *Richard*, and the repayment of the money brought by him before the Master; should be affirmed: But that so much of the said decree as related to the costs of suit of the several parties; should be reversed: And it was further ORDERED and ADJUDGED, that that part of the said decree which contained a declaration, "that the appellant ought to have satisfaction for the legacy of 1000*l.* given his late wife out of the testator's personal estate, in like manner as he was to have the 1000*l.* charged on the trust estate," should be affirmed; but as to so much of the said decree as directed the receiver of the rents and profits of the trust estate to be discharged, the same was reversed: And it was ORDERED, that the Court of Chancery should appoint a receiver of the rents and profits of the said trust estate, with a proper salary to be paid out of the produce thereof: And it was lastly ORDERED and ADJUDGED, that the said decree in all other respects not hereby varied or reversed, or inconsistent with the directions hereby given, should be affirmed.

Case 73. *Frances Lucy*, Widow, - - - Appellant.

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penes me.*

The Honourable *Robert Moor*, Esq; }
George Guy, *Charles Newburgh*, *Thomas Burgh*, and *Rowland Berkley*, } Respondents.

21st April, 1730.

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GEORGE *Bobun*, Esq; being possessed of a leasehold estate near *Spital-fields*, in the county of *Middlesex*, and other lands and hereditaments, and of a considerable personal estate; and having issue only four daughters, made his will, dated the 17th of July, 1705, and thereby devised to Dr. *Ralph Bobun*, Mr. *Humphry Barker*, and the respondents *Rowland Berkley*, *George Guy*, *Charles Newburgh* and *Thomas Burgh*, and their heirs,

heirs, certain messuages and lands in the county of the city of *Coventry*, and in the county of *Warwick*, upon trust, to permit his daughter *Susan* to receive the rents and profits thereof, until she should marry or die; and in case she married with the consent of the said *Newburgh* and *Burgh* and of her mother, that then they should convey the said estate in such manner as his said daughter *Susan*, with the consent of her husband, should appoint; and in default of such appointment, to his said daughter *Susan*, her heirs and assigns for ever. And in case his said daughter *Susan* should die before her marriage, or should marry without such consent; then that his trustees should dispose of his estates so devised, in such manner as touching the rest of his real estate was by his said will directed; and then his daughter *Susan* should only have an equal share with her other sisters of the residue of his estate, after payment of his debts and legacies. — The testator further devised to the said trustees, and their heirs, all his real estate in or near *Spital-fields*, which he willed should be by them sold after his death, and the money thereby arising to be subject to the intents of his said will declared, concerning the residue of his estate. — He then devised to his daughter *Jane* 3500*l.* to be paid at her age of 21 or marriage; and after several other specific legacies and bequests, he gave the residue of his real and personal estate to his three daughters, *Mary*, *Elizabeth* and *Jane*, (and also to his daughter *Susan*, in case she should marry without such consent as aforesaid, and forfeit the estate intended for her, and not otherwise) to be equally divided amongst them share and share alike; and made his said trustees, together with *Mary* his wife, executors.

Susan afterwards intermarried with *Gilbert Clerk*, Esq; with such consent as by the will was required; and thereby became entitled to what was particularly devised to her, but excluded from any share of the residuary estate. And her sister *Jane* became entitled under the said will, to the 3500*l.* and to one third part of her father's real and personal estate equally with her other sisters, *Mary*, the wife of the respondent *Rowland Berkley*, and *Elizabeth*, the wife *Packington Tomkins*, who were entitled to the other two thirds thereof.

Jane in 1712, when under age, was married to *George Lucy*, Esq; and thereupon by articles dated the 23d of *December*, 1712,

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1712, between *George Lucy* of the first part, *Mary Bobun*, Relict of the said *George Bobun*, and the said *Jane* of the second part, and *Allen Lord Bathurst* and *Gilbert Clerk* of the third part; reciting, that a marriage was intended between the said *George Lucy* and *Jane*, with the consent of the said *Mary Bobun* her mother; and that the said *Jane*, by virtue of the said *George Bobun's* will, would be entitled to 3500*l.* at her age of 21, or marriage, and that she was entitled to divers lands in the will mentioned, or to a third part of the monies arising thereout, in such manner as by the said will was directed; and that the said *Jane* was willing to bestow on the said *George Lucy*, in consideration of the said marriage, as well the said 3500*l.* as also her interest in the real and personal estate of her said father devised, or which might descend to her, or in trust for her, as one of his coheirs or legatees, as soon as she should attain the age of 21, to hold to the said *George Lucy*, his heirs and assigns for ever: The said *George Lucy*, in consideration of such marriage and marriage portion, and of such conveyances to be made to him, and for securing to the said *Jane* a provision in case she should survive him, covenanted with Lord *Bathurst* and *Gilbert Clerk*, that he would upon such conveyances made to him upon the said *Jane's* attaining her age of 21, settle upon her, a jointure of certain lands therein mentioned of the yearly value of 800*l.* and that the reversion thereof, after the said *Jane's* death, should be further settled, together with other lands of the yearly value of 700*l.* to the use of the said *George Lucy* for life; remainder to his first and other sons by the said *Jane*, in tail male; and the reversion in fee to the said *George Lucy* and his heirs.

These articles were not executed by *Jane*, as being under age, nor did any of the other parties thereto, except the said *George Lucy*, execute the same, nor were *Jane's* trustees consenting that she should part with her inheritance in the premises; nor was she ever asked to execute or sign the articles after she attained her age.

The marriage however was had, and afterwards *Jane*, in order to raise the 3500*l.* was desired to join in a fine with her husband and her sisters and their husbands, for selling some part of her father's estate, which she accordingly did, and the 3500*l.* was paid to the said *George Lucy* her husband; but he never insisted,

or desired, that she should join in a fine for conveying the estate of her said father, belonging to her as one of his coheirs.

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After payment of the 3500*l.* which was the money portion expressed in the articles, and after *Jane* had for about six years attained her age of 21; the said *George Lucy*, without requiring any conveyance of the estate belonging to her, by indentures of lease and release dated the 4th and 5th of *March*, 1719, made between himself and the said *Jane* of the one part, and *Allen Lord Batbursf* and *Gilbert Clerk* of the other part, in consideration of the marriage, and in pursuance of the articles made previous thereto, and for making a jointure for the said *Jane*, and provision for their issue, *Lucy* did grant and convey to *Lord Batbursf* and *Gilbert Clerk*, divers messuages and lands in the county of *Warwick*, to the use of the said *George Lucy* for life; and after his death, as to several lands therein mentioned, to the use of the said *Jane* for her life, for a jointure: And as concerning the said premisses after her death, and the other premisses after the said *George Lucy's* death, to the use of the first and other sons of their bodies in tail male; remainder to the said *George Lucy*, his heirs and assigns for ever.

In *August*, 1721, *George Lucy* died without issue and intestate; and *William Lucy* his brother, by the consent of *Jane* his widow, took out administration to him.

This *William Lucy*, by the death of *George*, became entitled to his real estate not settled, which was very considerable, and to the reversion of the said *Jane's* jointure lands after her death, as brother and heir at law of *George Lucy*.

About the latter end of the year 1722, the said *Jane* intermarried with the respondent *Moor*; and she being entitled to one third part of her father's real estate, devised by his will to the trustees, and being minded to settle the same; by indentures of lease and release, dated the 17th and 18th of *June*, 1723, between the respondent *Moor* and the said *Jane* his wife of the one part, and *Dr. Henry Moor* and *Sir Gustavus Hume*, Bart. of the other part, and by fine levied; the said *Robert Moor* and *Jane* his wife, did bargain and sell to the said *Henry Moor* and *Sir Gustavus Hume*, the said *Jane's* third part of her said father's estate, to the use of the respondent *Robert Moor* for life; re-

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mainder to the said *Jane* for life; remainder to the said respondent in fee.

After the death of *George Lucy*, the said *William Lucy* his brother pretended to be entitled, as his heir at law, to the said *Jane's* third part of her father's estate; and therefore, after the respondent's intermarriage, exhibited his bill in the Court of Chancery, against the respondent and the said *Jane* his wife, pretending a right to her share of her said father's estate, under the aforesaid articles, and to have a conveyance thereof to him and his heirs.

To this bill the respondent and *Jane* put in their answer; and the said *Jane* stated her case in the manner above mentioned, and swore that *George Lucy* her late husband, as they lived happily together and had no issue, made the aforesaid settlement on her, and often told her he would leave her own estate to come to her. And the said *William Lucy*, though he lived six months after the answer was put in, proceeded no further in the suit.

In December, 1723, *Jane* died without issue, and administration of her goods and chattels was granted to the respondent *Robert Moor* her husband; who by virtue thereof, and of the last mentioned conveyance and fine, became entitled to her share of the estates, real and personal, of the said *George Bobun* her father, and of the rents and profits thereof which became due and were received by the trustees and executors of his will.

In February, 1723, the said *William Lucy* also died without issue, leaving *Foulk Lucy* his brother and heir at law, but having before his death made his will, and appointed the appellant his widow, executrix; who thereupon, and under the will of the said *William Lucy*, pretended to be entitled to all the right and share belonging to the said *Jane*, in the estate real and personal of the said *George Bobun*.

In Michaelmas term, 1724, the appellant exhibited her bill in the Court of Chancery, against the respondent *Moor* and others, to the same effect with *William Lucy's* bill; and therein set forth, that the said *William Lucy* by his will, had charged his whole estate with the payment of his debts and legacies, and gave legacies and charities to a considerable value, and made the
appellant

appellant executrix, and that she had proved his will and taken out administration to the said *George Lucy*; and she insisted, that as executrix of *William*, and administratrix of *George Lucy*, she was entitled to all right and share belonging to the said *Jane*, in the estate real and personal of the said *George Bohun*.

1730.

To which bill the said respondent put in his answer, and insisted on his right, to the effect above mentioned; and in *Michaelmas* term, 1725, exhibited his bill in the said Court against the appellant and against the said *Foulk Lucy*, *George Guy*, *Charles Newburgh*, *Thomas Burgh*, *Rowland Berkley* and *Mary* his wife, and *Packington Tompkins* and *Elizabeth* his wife, to have a conveyance of the said estate made to him, and for an account of the rents and profits thereof.

To this bill, the appellant put in her answer and insisted, as by her bill; and the said *Foulk Lucy* claimed a right, as heir at law of *William Lucy* and *George Lucy*; and the other defendants submitted to the directions of the Court.

On the 12th of *November*, 1728, both causes were heard before the Lord Chancellor *King*; when his Lordship ordered and decreed, that the plaintiff's bill in the original cause should be dismissed, except as to her claim, as executrix of *William Lucy*, to certain tythes in the pleadings mentioned; and on the cross bill it was ordered and decreed, that an account should be taken of the trust estate, under the will of *George Bohun* since his decease, on which account all just allowances should be made, and all deeds, rentals, papers and writings were to be produced upon oath, and all parties to be examined on interrogatories, as the Master should direct. And one third part of the said rents and profits was to be paid to the respondent *Moor*, and the other two thirds to the defendants *Berkley* and *Tompkins*; and that a commission should issue to divide the said trust estate into thirds; and that after such partition made, the surviving trustees should convey one third to the respondent *Moor* and his heirs, and the other two thirds, to the two other devisees, according to their respective interests therein; and the trustees in the will of the said Mr. *Bohun* were to have 40s. costs.

To reverse this decree, the present appeal was brought; and on behalf of the appellant it was insisted, that where a suitable jointure is made, (as in this case there was a much greater one

N. Fazakerley.
D. Davenport.

than

than Mrs. Moor's whole fortune required; it ought to be intended to be in consideration of the fortune, tho' not so expressed, and ought to entitle the husband to such fortune, tho' not actually paid. That this jointure was expressed to be made in pursuance of the articles, and the reference to them was the same, as if they had been fully recited: That as the lands limited for jointure, were the same in the settlement as in the articles, the settlement must therefore be upon the foundation of the articles; and Mrs. Moor's executing the settlement when of age, and her acceptance of the jointure after George Lucy's death, was a full agreement to and confirmation of the articles, tho' she was under age at the time they were made. That tho' she might have waived her jointure, and claimed her fortune, which remained unpaid; yet, by accepting her jointure, she had made her election, and ought therefore to give up her fortune, which was the consideration of her jointure, or otherwise she would have a double satisfaction.

P. Yorke.

C. Talbot.

On the other side it was said, that tho' Jane was an infant when married to George Lucy, yet the settlement was made long after the marriage; and therefore she was entitled to her election, either to insist on her dower out of her husband's estate, or claim the lands settled for her jointure; but William Lucy, the brother and heir of George, never called upon her to make such election, well knowing that her dower would have amounted to much more than the jointure. That George Lucy, who was the only person entitled under the articles to require a conveyance of Jane's estate, never demanded one; tho' she was of age six years before he made the settlement, and tho' he lived two years after it was made; but, on the contrary, always declared, both before and after making the settlement, that he would leave her estate for her own benefit. That the settlement so made did not exceed the third part of the estate which, by law, Jane would have been entitled to, so that she thereby gained nothing; but George Lucy received 3500 l. in money as her portion, and she did not live above a year and a half after him to enjoy her jointure. That the respondent Moor claimed under the conveyance made by his wife, who, by her father's will, and as one of his coheirs, had a right to one third part of his estate, and had done no act to dispose of it to George Lucy, her first husband; but the appellant was only the executrix and devisee of William Lucy, the brother and heir of George,

Cases in Parliament.

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George, and was no otherwise related to the family of the *Lucy's*, than as being the wife of *William*, from whom she enjoyed a considerable part of the family estate; and therefore there appeared no reason to make a strained construction, to give her any part of the respondent's estate, contrary to the intention both of *Jane* and her first husband.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

DECREE
affirmed,
Jour. vol. 23.
P. 543.

John Pratt, Esq;

Appellant.

Case 74.

William Hopkins, Benjamin Midford,
Henry Talbot and Joseph Farmer,

Respondents.

2d May, 1730.

THE respondents were proprietors and occupiers of several parcels of land, formerly part of *Glastonbury commons*, and commonly called or known by the several names of *Common-moor*, *Black-acre* and *South-moor*, alias *Alder-moor*, and were inclosed by virtue of an act of Parliament made for that purpose in the year 1721.

Grounds and
Rudiments of
Law and
Equity,
P. 338. ca. 9.

The appellant, in the year 1719, obtained a lease from the Bishop of *Bath and Wells*, of the rectory and parsonage of *St. John Baptist*, with the chapel of *St. Bennings* in *Glastonbury*, and other chapels therein mentioned, and of all tythes thereto belonging, for three lives; and after the inclosure of the commons, viz. in *Michaelmas* term, 1724, he exhibited his bill in the Court of Exchequer, against the respondents and others, in order to compel them to account with and make him satisfaction for the tythes arising out of the new inclosures, and particularly out of *South-moor*.

The appellant being well apprised of the respondent's defence, with relation to their lands in *South-moor*, viz. that the same were exempt from the payment of tythes, as having been part of the demesnes of the great and ancient monastery of *Glastonbury*;

1730.

Curry did in his bill alledge, that *South-moor* was not part of the demesnes of the said monastery; but if it was, and might, for that reason, have been exempt from tythes before the making the act for inclosing the said commons, yet the same were made liable and subject to the payment of tythes, by the following clauses in that act.

“Provided always, and it is hereby declared and enacted by the authority aforesaid, that nothing herein contained shall extend, or be construed to extend, to prejudice any right or interest which the Lord Bishop of *Bath and Wells*, the impropriator of the rectory or parsonage of *St. John Baptist* in *Glastonbury* aforesaid, or his lessee, hath, have or may have to any tythes which shall belong, or may accrue to them or either of them, out of the said new inclosures hereby to be made; and that such impropriator, or his lessee for the time being, shall have and receive all tythes of what kind soever, of and from the said new inclosures, as he is or shall be by law entitled to have and receive, as rector or impropriator of the said parish; notwithstanding any modus, or pretence of a modus or composition in any other parts of the said parish, or any exemption whatsoever.—And it is hereby further enacted by the authority aforesaid, that the said Bishop of *Bath and Wells*, the impropriator of the rectory or parsonage of *St. John Baptist* in *Glastonbury*, for the time being, or his lessee, as the said Bishop or lessee shall be respectively possessed, or entitled to the tythes of the said new inclosures, shall, for a further augmentation and better provision for the Curate of the said parish church of *St. John Baptist* in *Glastonbury*, pay or cause to be paid unto the Curate of the said parish, and his successors for the time being, yearly and every year, the full sum of 12*l.* of lawful *British* money, out of the tythes that shall or may arise out of the said new inclosures hereby to be made, free from all taxes whatsoever.”

To this bill the respondents put in their answers, and thereby admitted the appellants right to tythes, out of all such parts of the new inclosures, as lay in *Common-moor* or *Black-acre*; but as to such parts of them as were taken out of *South-moor*, they insisted that the same were exempt and free from tythes; the said common called *South-moor*, which had heretofore been of much

much greater extent than what was intended to be inclosed by the act, having formerly been part of the demesnes of the aforesaid monastery, and no tythes having been paid or answered for any part thereof; and the respondents submitted to the Court, that the act, as passed, had not given the appellant any right to tythes, to which he was not before entitled by law.

In *Trinity* term, 1726, the appellant replied to the respondents answers, and soon after came to an agreement with them; to accept what was due for tythes arising out of *Common-moor* and *Black-acre*, together with his costs; which being stated together at 17*l.* 9*s.* 2*d.* was accordingly paid to the appellant.

After this, the appellant and respondents proceeded to examine their witnesses, touching the appellant's demand of tythes out of *South-moor*; and the depositions being duly published, the cause came on to be heard before the Barons on the 19th of July, 1728, and was heard in part, and, by consent on both sides, adjourned over to the next term; and upon a full hearing on the 14th of November following, the Barons unanimously delivered their opinions, that the respondents had fully proved the exemption insisted on by their answers; and that the act for inclosing the commons, had given the appellant no new right to tythes out of the said lands in *South-moor*; and therefore decreed, that the appellant's bill should be dismissed with costs.

The appellant therefore, appealed from the decree; contending, that by the express words of the act, the impropiator, or his lessee for the time being, were to have and receive all tythes of what kind soever, arising from the new inclosures, notwithstanding any modus or composition in any other parts of the parish, or any exemption whatsoever; and that these last words would be of no manner of use, if the inclosures in *South-moor* were to be exempt from the payment of tythes, it being admitted by the respondents answer, that the other two commons ought to pay tythes. That according to the act, a certain quantity of the commons, containing ten acres, was to be inclosed as a better provision for the Curate of the parish, but no distinction was here made as to *South-moor*, so that this allotment might as well be made of lands in *South-moor*, as in either of the other commons: Whereas if *South-moor* had been exempt,

J. Willes.

G. Eyre.

1736.

exempt from the payment of tythes, and had not been intended to be subject to tythes after the inclosures were made, the Curate's allotment ought to have been confined to the other two commons, which were confessedly subject to the payment of tythes. That the impropiator and his lessee were expressly obliged, as they should respectively be entitled to the tythes of the new inclosures, to pay to the Curate of the parish the yearly sum of 12*l.* free from all taxes, out of the said tythes; whence it was plain, that the act never intended to make any distinction between the commons, the tythes of all the new inclosures being equally made the fund for payment of this 12*l.* *per ann.* That there was an express saving in the act, that nothing therein contained should extend to prejudice the right and interest of one Mr. *Strode*, in respect of an inclosure of 100 acres made by him in *South-moor*; and this saving would have been equally extended to the residue of the moor, unless it had been intended to be subject to the payment of tythes. That tho' the proprietors and owners who had inclosed the commons, had greatly improved their own estates, yet it appeared from the evidence, that the rectory was thereby lessened in value, for want of sufficient flocks of sheep to manure the arable grounds; by which means, and by the annual payment of 12*l.* to the Curate, which the appellant had constantly paid, he must be a considerable loser, if excluded from the tythes of the inclosures in *South-moor*. And therefore it was hoped, that the decree would be reversed.

T. Lutwyche.

N. Fazakerley.

On the other side it was said, that the question concerned only the inclosures of the common called *South-moor*, which, by the proofs in the cause, appeared to be part of the demesnes of the monastery of *Glastonbury*, and as such, exempt from the payment of tythes; that no tythes had ever been paid for this common, tho' at different times improvements and inclosures had been made of several parts of it; so that there was no room for the Court to doubt, but that, at the time of passing the act, the lands in question were exempt from the payment of tythes. That the first clause, insisted on by the appellant, was only a general saving to the Bishop and his lessee, of their former right to tythes; and as to the latter part of that clause, which the appellant chiefly relied upon, acts of Parliament were to have a reasonable construction, and taking the whole clause together,

together, it appeared calculated merely to preserve the impropriator's right, notwithstanding any pretence of a modus, &c. in other parts of the parish: And it would be very extraordinary by the general words, *or any exemption whatsoever* at the end of this clause, to destroy a clear legal exemption, when the whole drift of the clause was only to preserve such right as the Bishop, the impropriator, or his lessee then had. That there could be no reason in this case to take away an exemption in favour of an impropriator, because the act did not tend to diminish the tythes; but on the contrary, the tythes arising from the improvement of the other commons, would greatly increase the yearly value of the impropriation.

1730.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree of dismissal therein complained of, affirmed: And it was further ORDERED, that the appellant should pay to the respondents, 30*l.* for their costs in respect of the said appeal.

DECREE affirmed.
Jour. vol. 23.
P. 559.

Gio Marino de Ghettoff, and Others, Appellants. Case 75.
The Governor and Company of the } Respondents.
London Assurance,

1st February, 1730.

IN the year 1720, some merchants at *Ostend* set up a trade to the *East Indies*; and amongst others, one *James Maelcamp* equipped a ship called the *Flandria*, for a voyage to *China*, wherein several persons were concerned.

Maelcamp had the care and direction of the ship, and gave receipts to the several persons concerned, for the monies they paid, promising to be accountable to them for their respective proportions of the net profit of the voyage.

These transactions being carried on mostly at *Ostend*, or *Antwerp*, the several persons who had a mind to be concerned in the undertaking, gave directions to their correspondents at

1730.

those places, to pay *Maelcamp* what sums they thought fit, and to take his receipts for the same.

The appellants gave directions to one *Lewis Francis de Conninck*, to pay several large sums to *Maelcamp*, on account of the said undertaking; and accordingly *de Conninck* paid him divers sums, amounting to 35000 guilders, and took distinct receipts for the same, according to the proportion for which the appellants were concerned therein: He also, by the order and direction of the appellants, and for their use and benefit, agreed with the respondents to insure on the said ship the *Flandria* 5000*l.* and by a policy dated the 26th of *December*, 1720, this insurance was effected, at a premium of 12*l.* per cent.

The ship sailed from *Ostend* on the 13th of *February*, 1721, new stile, in order to proceed to *China*; but in her way, and before she arrived there, some time in the month of *July*, 1722, was seized at *Bencoolen*, in the *East Indies*, by the Governor of that place, being a settlement of the united company of merchants of *England* trading to the *East Indies*; and the ship and cargo were thereupon confiscated.

The appellants, upon notice of this event, applied to the respondents for payment of the 5000*l.* insured, and produced to them the several receipts for their respective interests in the ship, and affidavits affirming the several sums therein mentioned, to have been really and *bona fide* paid by them respectively; but the respondents refusing to pay the appellants the said 5000*l.* or make them any satisfaction whatsoever; they, in *Trinity* term, 1728, brought their bill in the Court of Chancery against the respondents, and the said *Lewis Francis de Conninck*, praying, that the respondents might be decreed to pay the appellants the said sum of 5000*l.* with interest, according to their several and respective shares and proportions thereof.

To this bill the respondents put in a demurrer and answer, and to such part of the bill as sought to compel them to pay the appellants the 5000*l.* or to make them any satisfaction for any loss that had happened to the ship they demurred; and for cause of demurrer shewed, that if the policy of assurance in the bill mentioned was forfeited, a proper action at law lay to recover the money due thereupon; and that the appellants, if they were entitled to such relief as they prayed by their bill, might

might have their compleat and adequate remedy by an action at law, where such matters were properly cognizable, and where the appellants ought to prove their interest in, and the loss of the ship: By their answer they admitted the policy, and said, they had heard that the ship was seized at *Bencoolen*.

This demurrer came on to be argued on the 15th of *January*, 1728, before the Lord Chancellor *King*; when his Lordship was pleased to order, that the consideration thereof should be respited, until the coming in of the defendant *Conninck's* answer, he having not then put in his answer to the bill, and if the appellants did not procure such answer in two months, the demurrer should be allowed.

Conninck accordingly put in his answer within the two months, and thereby admitted that he made the assurance in his own name, in trust and for the benefit of the appellants; but said, he did not care to permit the appellants to bring any action against the respondents on the policy in his name; he being advised, that if any such action should be brought, and they should not prevail therein, he would be personally liable to pay all the costs and charges occasioned in consequence thereof.

On the 21st of *November*, 1729, the demurrer came on to be further argued; when it was ordered, that the same should be allowed.

The appellants therefore appealed from the order, contending, that they could not maintain an action at law upon the policy in their own names; and that it was in the power of *Conninck*, whether he would permit his name to be made use of in such action, or not. But if the appellants were able to bring an action in their own names, it would be to no purpose, because all their witnesses who could prove the seizure and confiscation of the ship, and the respective interests of the appellants therein, lived at different places abroad, and were not in the power of the appellants, nor could they compel them to come over here, to be examined upon any trial at law. That therefore the appellants had no remedy against the respondents upon this policy, but in a Court of Equity; where they might have a commission for examining their witnesses abroad, and thereby be enabled to prove the seizure and confiscation of the ship. That in case they were deprived of this remedy, they would not only

lose

C. Talbot.

W. Mellmoth.

1739.

lose the 5000*l.* to which they were justly entitled, but also the 600*l.* which they paid as a premium for making the insurance; while the respondents, tho' debtors to the appellants in 5000*l.* and interest, would, instead of paying such debt, go away with 600*l.* of their money.

J. Willes.

D. Ryder.

On the other side it was insisted, that the appellants demand was plainly a demand at law, as they had nothing to prove but their interest and the loss of the ship, which were facts proper to be tried by a jury. That there was no equity suggested by the appellants bill, but a pretended difficulty to produce witnesses, and that their trustee refused to permit them to bring an action in his name: The former might with equal reason be suggested in almost every case of a policy of insurance, and the latter appeared manifestly to be thrown into the bill, merely to change the jurisdiction, and was in a great measure falsified by the trustee's answer; for he did not say he ever refused, but only that he did not care to permit his name to be made use of. And if bills of this kind were encouraged, it would be very easy to bring all sorts of property to be tried in a Court of Equity. It was therefore hoped, that the order would be affirmed, and the appeal dismissed with costs.

ORDER
affirmed.
Jour. vol. 23.
p. 600.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the order therein complained of, affirmed.

Case 76.

William Foord, Esq;

Appellant.

Ellen Foord, an Infant, by her Guardian

William Jolly, Esq; and the said *Wil-*

liam Jolly,

Respondents.

4th February, 1730.

JOHN Foord, an Alderman of the city of *Limerick*, in *Ireland*, was seised in fee of a considerable real estate in the counties of *Limerick*, *Clare* and *Tipperary*, and in the cities of *Cork*, *Waterford* and *Limerick*, all, or the greatest part whereof,

was let out by him on leases for lives and years; he was also possessed of a very considerable personal estate in mortgages and other securities for money: And having a wife and only two children, namely, *Rawlinson Foord* his eldest son, the father of the respondent *Ellen*, and the appellant his youngest son; he, on the 29th of *June*, 1711, made his will, and therein amongst other things, devised in the words following: — “As to my
“worldly substance which God hath been pleased to bestow
“on me, I give and bequeath it as followeth: My real estate,
“to the value of 356*l.* 14*s.* 4*d.* *per ann.* I give to my son
“*Rawlinson Foord*, now in the college of *Dublin*, when he
“comes to the age of 23 years old, and not before; he paying
“his mother, my wife, 150*l.* *per ann.* during her life, and
“he having 100*l.* *per ann.* paid him for his maintenance in the
“college, until the full age of 23 years, and then to enjoy the
“whole after his mother’s death, during his life, if he survives
“her. And the whole estate, of which he is but tenant for
“life, shall, after his decease, go to his eldest son that then shall
“be living; and if he die without any son or sons to enjoy it
“during their lives, (of which none are or shall be tenants but
“while they live to enjoy it) that then it shall come to his
“brother *William Foord* during his life, and to any of his
“heirs male during their lives, and no longer: And if they
“all die without issue male, then to the heirs male of my
“brother *Nicholas Foord’s* sons, and to any of their heirs male
“during their lives, of which none of them are tenants any
“longer; nor shall it be in any of their powers to sell, dis-
“pose, or convey, or make away any part, or the whole of it;
“and if in case they all die without heirs male, then it is to
“go to the next of kin to me. I also give and bequeath to
“my son *Rawlinson Foord*, as many mortgages as is in a
“schedule fixed to this, to the value of 645*l.* 16*s.* 6*d.* he to
“begin to enjoy it from the day after he is full 23 years of
“age, and no sooner; all the rents and profits to go to my son
“*William*, until that time, to make his fortune the better,
“and not to lessen *Rawlinson Foord’s* 1000*l.* *per ann.* after men-
“tioned; reserving out of them mortgages, the sum of 24*l.*
“*per ann.* to my wife *Elizabeth Foord* during her life; and
“that, with the above 150*l.* *per ann.* is in full for her of all
“dowry, jointures, legacies, or any challenge she hath or can
“pretend unto, except some rent and interest monies her father
“left her in *England*; so that the whole intent of this will,

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is to leave my son *Rawlinson* in real and personal estate, when he comes to the age of 23 years, 1000*l.* per ann. if the land and mortgages which is in the schedule will amount unto it; he paying his mother's jointure out of the estate and mortgages during her life; and if *Rawlinson* dies before he comes to the age of 23 years, then all is to go to my son *William Foord* and his heirs, &c."

In the schedule mentioned in the will are the words following: "An account how I dispose of my estate to my son *Rawlinson Foord*, as followeth; he paying his mother out of my real estate the sum of 150*l.* per ann. during her life, and 24*l.* per ann. during her life out of my mortgages, and then all to revert to my son *Rawley Foord* during his life; and after his death to his sons, and for want of sons, to his brother *William Foord* during his life, and afterwards to *William Foord's* eldest son, and for want of his having sons, to my brother *Nicholas Foord's* sons, and for want of any sons to my eldest son's daughters, and so to the next of kin." —

The testator then specified the particulars of his real estate amounting to 356*l.* 14*s.* 4*d.* per ann. and likewise the particulars of his mortgages, amounting to 645*l.* 16*s.* 6*d.* per ann. devised to his said son *Rawlinson Foord*.

Afterwards, on the 15th of *August*, 1712, the testator made a codicil to his will; wherein, taking notice of an estate therein mentioned, part of the lands of *Castleconnel* in the county of *Limerick*, to have been lately purchased in the name of his son *William Foord*, the appellant; he devises, "that the same shall be and remain to his said son *William Foord*, and the heirs male of his body; and for want of such heirs male, to be to the use of his son *Rawlinson Foord*, and the heirs male of his body; and for want of heirs male of both their bodies, to go to the female issue of *William*, with other remainders over." — And in another part of the same codicil were contained the following words; viz. "And for that by the said will I have ordered, that the profit of my estate and mortgages should go to my son *William* till the said *Rawley* should be 23 years of age, he having thereout till then 100*l.* per ann. and my said wife's jointure or annuity to be also paid: Now I further devise and declare, that my said son *William* shall have the benefit of my said estate and mortgages till

"till the 1st day of November, 1713, inclusive, paying there-
out, until then, to the said *Rawlinson* 100*l.* per ann. and also
to my said wife the jointure or annuity hereby devised her;
and from and after the said 1st of November, the said estate
and mortgages to be and remain to the said *Rawlinson* and his
heirs, subject to the limitations in the said will."

In 1712, the testator died without altering his said will and
codicil.

Rawlinson Foord attaining his age of 23, on the 1st of No-
vember, 1713, entered upon the said real estate; and soon after
levied fines, and suffered recoveries thereof, which were declared
to be to the use of himself and his heirs; but apprehending that
he had thereby great reason to fear a forfeiture of his estate for
life, he granted a lease to one *Daniel Grady*, of all the said real
estate and mortgages, for the term of 99 years, if he, the
grantor, lived so long, in trust for himself, and in order to pro-
tect him against any forfeiture.

Rawlinson Foord also possessed himself of the said mortgages
and securities for money, and called in great part of the money
due thereon, and either retained the same in his own hands, or
else placed it out again at interest on other securities in his own
name, and received the interest thereof during his life.

In December, 1725, *Rawlinson Foord* died intestate, having
never had any issue male, leaving the respondent *Ellen* his only
daughter and heir at law, an infant of the age of nine years, or
thereabouts; whereupon the respondent *William Jolly*, as guar-
dian to the respondent *Ellen*, took out letters of administration
to *Rawlinson*, and in her right, as guardian, entered upon the
real estate, and possessed himself likewise of the said several
mortgages and other securities for money, and of all the per-
sonal estate belonging to *Rawlinson* at the time of his death;
and also got into his custody the several deeds, counterparts of
leases, and other writings relating to the said real and personal
estate, and set up an absolute title thereto in right of the respon-
dent *Ellen*.

The appellant being advised that *Rawlinson Foord* being, only
tenant for life, and dying without issue male, the real estate and
mortgages belonged to him, according to the limitations of the
will; and that the leases of the real estate made by his father,
then

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then subsisting, would be a bar in his way upon a trial of his title at law: He, therefore, in July, 1726, exhibited his bill in the Court of Exchequer in *Ireland* against the respondents, praying to be decreed to the possession of the said real estate, and to the benefit of the mortgages, pursuant to the devise to him made by the said will and codicil; and to have an account of the issues and profits of the said estate and mortgages, since the death of *Rawlinson Foord*; and that the money received by the respondents, might be paid over to the appellant, and for a discovery and delivery of the several deeds, evidences and writings relating to the said real and personal estate.

To this bill the respondents put in their answers; and thereby admitted the will and codicil, and that *Rawlinson Foord* had received several sums of money due upon the mortgages, and applied them to his own use as he thought proper; but insisted, that *Rawlinson Foord*, by virtue of the said will and codicil, was tenant in tail male of the real estate, and was absolutely entitled to the mortgages and personal estate devised to him by the will, which were not capable of being limited or devised over in remainder. They also stated, that *Rawlinson* had levied fines and suffered recoveries of the real estate to the use of himself and his heirs, and thereby became seised thereof in fee; and being so seised, he died intestate: And that the respondent *Ellen*, being his heir at law, became entitled, by descent, to the said real estate. They admitted, that the respondent *Jolly* had received the profits and produce of the said estate and mortgages, since the death of *Rawlinson*, and had also possessed himself of all the other personal estate which *Rawlinson* died possessed of.

The appellant having replied to the answer, and issue being joined, one witness only was examined, viz. *Bartholomew Stretch*; who deposed, that at the desire of the testator, he drew the codicil, but did not apprehend or believe that the testator intended by such codicil, to alter or change the limitations of the estate, otherwise than as it was limited and settled in the will; but on the contrary, that he apprehended it to be the true intent and meaning of the testator, that the estate should go according to his limitations in the will; and therefore, not thinking himself capable of limiting estates according to law, and for fear of committing an error, he, in the codicil, subjected

subjected the estate to the limitations in the will, in such words as were contained in the codicil, but without any design of altering the limitations settled in the will.

1730.

On the 27th of May, 1728, the cause was heard; when the Court were of opinion, that the mortgages were absolutely vested in *Rawlinson Foord*; and that he was tenant in tail of the real estate, and that the entail was well barred; and therefore dismissed the bill with costs.

To reverse which decree, the present appeal was brought; and on behalf of the appellant it was argued, that wills are always construed according to the testator's intention, which, in this case, appeared plainly to be, that *Rawlinson Foord* should have only an estate for life; for even by express words in this will, an estate for life only was given; and it is an established rule of construction, that where a particular estate is expressly given, it shall not be altered by any implication from subsequent words; especially where such implication, if admitted, defeats the general intent of the will. That if any stress was laid upon the words of the codicil, whereby the premises were devised to *Rawlinson Foord* and his heirs, subject to the limitations of the will; it was conceived to be clear, that the only intent of the codicil, was to dispose of the new purchased lands, and fix a particular time when *Rawlinson Foord's* interest was to commence in possession, but not to make any real change in the subsequent limitations of the estates devised by the will; but if those words should be taken to have any effect, they could at most be considered as creating a trust, subject to the limitations of the will, as to the beneficial interest. And yet when the evidence of *Stretch*, who drew the codicil, was considered, it plainly appeared that these words were inserted by himself, without any direction from the testator; who did not intend to alter the limitations of his will, but, on the contrary, meant that they should stand. That wherever an estate tail has been raised by implication, it has been to answer the apparent intention of the testator; but in this case, the testator devised his estate to his son *Rawlinson* for life. And immediately repeats, "that the whole estate, of which he is but tenant for life, shall, after his death, go to his eldest son, that shall be living at his death." And in another part of the will, where he stated the particulars of what he had disposed of to his son

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Rawlinson, he paying his mother 150*l.* per ann. during her life, he used these words, "then all to revert to my son *Rawley* during his life," &c. So that in three several parts of the will, he gave him but an estate for life, and how his intention could be construed to mean an estate tail, it was not easy to apprehend.

C. Talbot.

T. Reeve.

On behalf of the respondents it was contended, that the question in this case concerning the real estate, was properly determinable at law; and that there was nothing either appearing or proved in the cause, to prevent the appellant from trying his title in that way, or to make it necessary for him to come into a Court of Equity. But supposing there were, it was insisted, that by the true meaning of the testator's will, *Rawlinson Foord* was tenant in tail, and that he having levied a fine and suffered common recoveries, all the remainders were well barred; for, should any other construction prevail, *Rawlinson* might have left a grandson, who could not have taken the estate under the will; and it could not be imagined to have been the testator's intention, that his second son should be preferred, as to this estate, before the grandson, or any other male issue of his eldest son. That the personal estate consisting in mortgages and bonds, was, by the will, absolutely devised to *Rawlinson*, without any limitation over, or any direction to lay the same out in a purchase of lands to be settled, or any devise to trustees for that purpose, nor was it in any manner altered by the codicil; on the contrary, *Rawlinson* had thereby power to receive, and did in fact receive, several principal sums due on mortgages and bonds, and applied them as he thought fit. And as the absolute right to the personal estate was in him, so upon his death, it vested in the respondent *Ellen*, as his only child; and accordingly administration thereof had been granted to the other respondent, in trust for her. It was therefore hoped, that the decree of dismissal would be affirmed, and the appeal dismissed with costs.

DECREE
reversed
in part.
Jour. vol. 23.
p. 603.

BUT, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that so much of the decree as related to the mortgages and other personal estate of the testator *John Foord*, should be affirmed; but as to his real estate, the said decree should be reversed: And it was further ORDERED, that the respondents should come to an account for the rents and profits of

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of the real estate, received by them or either of them, and which had grown due since the death of *Rawlinson Foard*, and should pay the same to the appellant; and that the respondents should likewise deliver possession of the real estate to the appellant, and all deeds, evidences, writings and leases relating thereto; and that the said Court of Exchequer should cause this order and judgment to be put in effectual execution.

1730.

John, Lord Viscount Barrington,
Administrator of John Wild- } Plaintiff
man, Esq;

Case 77.

Susannah Searle, Widow, Admini- } Defendant
stratrix of George Searle, Gent.

in Error.

8th February, 1730.

THE defendant in error having, on the 6th of July, 1723, obtained letters of administration in the Prerogative Court; in Hilary term, 1725, brought an action of debt in the Court of King's Bench, against the plaintiff in error, upon a bond entered into by the said *John Wildman*, in his life-time, to the said *George Searle*, in the penalty of 600*l.* dated the 24th of June, 1697.

8 Mod. 279.
Viner, vol. 12,
p. 85. ca. 11.
120. ca. 1.
and note.
2 Ld. Raym.
370.
3 Wms. 397.
note.
2 Eq. ab. 414.
note to ca. 16.

The plaintiff in error craved oyer of the condition of this bond, which was for the payment of 307*l.* 10*s.* on the 25th of December next ensuing the date thereof; and thereupon he pleaded, that *John Wildman* the obligor, in his life-time, viz. on the 10th of February, 1709, paid to the said *George Searle*, the said 307*l.* 10*s.* in the said condition specified, and all interest due upon the said bond, in full satisfaction and discharge thereof.

To this plea, the defendant in error replied, *non solvit modo et forma*, as by the plea was alledged, and thereupon issue was joined.

The cause came to be tried before the Lord Chief Justice *Raymond*, at the Sittings after Easter term, 1726; and the

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counsel for the plaintiff in error, instead of giving evidence to support his plea, that the money was paid, insisted upon the presumption in law, that the bond was dated the 24th day of June, 9 Will. III. and that 28 years were lapsed from the date of the bond, to the exhibiting the bill; and therefore, by law, the bond ought to be presumed to be paid, unless the defendant in error could shew, that interest had been paid, or a demand made within 20 years, or some other matter, to take off and invalidate this presumption.

The counsel for the defendant in error thereupon, in support of the issue on her part, gave in evidence, that the obligor died in the month of April, 1710, and also the bond, under the seal of the said John Wildman, and likewise offered in evidence two indorsements upon the bond, in the proper hand writing of the said George Searle, and in the words and figures following, viz. "Received of John Wildman, Esq; in full of
" all interest due on the bond within mentioned, to the 25th
" day of December, next ensuing this date. Witness my hand
" this 7th day of December, 1699, George Searle. March the
" 25th, 1707, Received in full of all interest due on this bond
" to the 25th of this instant, George Searle." But it not appearing when these indorsements were made, otherwise than by the indorsements themselves, the counsel for the plaintiff in error opposed the giving them in evidence to the jury; but after this point was very fully debated by the counsel on both sides, the Lord Chief Justice was of opinion, that these indorsements were evidence to be left to the consideration of the jury, and therefore allowed them to be read; and other circumstantial evidence being given, to induce the jury to believe the bond was not satisfied, there was a verdict for the plaintiff.

Whereupon, the counsel for the plaintiff in error offered a bill of exceptions, whereby they insisted, that the indorsements ought not to be read in evidence; which being sealed and allowed by the Chief Justice, the plaintiff in error brought a writ of error in the Exchequer Chamber, and in Michaelmas and Hilary terms, 1728, the errors being twice solemnly argued before the Judges of the Common Pleas and the Barons of the Exchequer, the judgment of the Court of King's Bench was affirmed, by the opinion of all the Judges and Barons then present, except one.

To reverse this judgment of affirmance, and also the judgment of the Court of King's Bench, a writ of error was brought in Parliament; and on behalf of the plaintiff it was insisted, that the only evidence given by the plaintiff in the action, to take off the presumption arising from the great length of time, that this bond was satisfied, was the two indorsements made thereon by Mr. Searle, who was the obligee in the bond, and who could be no witness for himself, or any person claiming under him, and had the bond always in his own custody.

P. Yorke.

T. Reeve.

On the other side it was contended, that the plea in this case was not a plea of payment, at the day mentioned in the condition, but of payment of principal and interest before the action brought, viz. on the 10th of *February*, 1709, which was but 16 years before the action brought; and being under 20 years, was a shorter time than ought to be allowed as a presumption of payment. But admitting, that the plaintiff in error was entitled to the benefit of this presumption upon his said plea, yet the evidence offered and given on the part of the defendant in error, was very proper evidence to take off the presumption; for the making such indorsements of the receipt of interest upon bonds, written with the obligee's own hand, is the common and usual method upon the payment of interest, it being most for the obligor's benefit to have the discharge for the interest appear upon the security itself; and in most cases, it is the only evidence that the obligee can have of the payment of interest. That as such payments are frequently and generally made between the obligor and obligee, when no other persons are present; it might be of dangerous consequence to the obligees in old bonds, if such indorsements are not to be admitted as evidence to take off the presumption: And as it would be dangerous totally to reject this evidence, so likewise if the indorsements were admitted to be read, the jury, who are the proper judges of fraud, and of the truth of facts, would have it under their consideration what credit to give them, and to determine whether they were falsely and fraudulently made or not. That if these indorsements were made upon the bond at the respective times they appear to bear date, their being written with the obligee's own hand, was no objection to their being read in evidence; because it was impossible that he could have any bias upon him, or be in any manner influenced to make them, for they were evidence against him, and he could

T. Lutwyche.

N. Fazakerley.

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JUDGMENTS
affirmed.
Jour. vol. 23.
p. 606.

derive no advantage from them, as he had no occasion to take off the presumption of payment, there not being a lapse of 20 years, from the day of payment to the date of the indorsements. And therefore it was hoped, that the judgments would be affirmed with costs.

ACCORDINGLY, after hearing counsel on this writ of error, and also the Judges, who delivered their opinions *seriatim*, it was ORDERED and ADJUDGED, that the judgment given in the Exchequer Chamber, affirming the judgment in the Court of King's Bench, should be affirmed; and that the record should be remitted, to the end, execution might be had thereupon, as if no such writ of error had been brought into the House: And it was further ORDERED, that the plaintiff should pay to the defendant 5*l.* for her costs, sustained by reason of bringing the said writ of error*.

Case 78.

Walter Radcliffe, Esq;

Appellant.

Martha Fursman, an Infant, by her
next Friend, } Respondent.

10th February, 1730.

ON the 29th of September, 1703, Jasper Radcliffe, Esq; gave a bond in the penalty of 900*l.* to Jane Davy, conditioned to pay her 450*l.* at 5*l.* per cent. interest, on the 30th of September, 1704; and on the 19th of October, 1703, he gave another bond to Mary Andrews in 500*l.* penalty, conditioned to pay her 250*l.* with interest at 5*l.* per cent. on the 20th of October, 1704; both which sums of 450*l.* and 250*l.* were the property of Martha, the wife of Henry Mannaton, Esq; and were taken in trust for her and for her separate use, exclusive of her husband.

* By a manuscript note on this case it appears, that Mr. Baron Comyns was for reversing the judgments; and that Lord Raymond, Lord Chief Justice Eyre and Mr. Justice Probyn were absent.

The

The said *Jasper Radcliffe* by his will, dated the 7th of October, 1703, gave 30*l.* per ann. to his daughter *Martha Radcliffe*, the respondent's mother, till she should marry or die; and if married with the consent of her mother, he gave her 1400*l.* for her fortune, payable within twelve months next after her marriage; he then devised real estates of 20,000*l.* value, of which he was seised in fee, to his wife *Jane Radcliffe* and to the said *Henry Mannaton* for 500 years, in trust for payment of all his just debts and legacies; and made *Jasper Radcliffe* his son executor and residuary legatee, and died in November, 1704.

Martha Mannaton, who was aunt to the respondent's said mother *Martha Radcliffe*, by deed dated the 18th of November, 1707, appointed, that immediately after her own death, the said 250*l.* and the interest then due, should be paid to the said *Martha Radcliffe* for her separate use.

In 1716, *Henry Mannaton* died; and in July, 1721, the said *Martha* his wife, who had the equitable right to the money due on the said bonds, and always had the custody and possession of them, also died; having before her death made her will, and thereof appointed the said *Martha Radcliffe* executrix and residuary legatee.

Jasper Radcliffe left at his death three sons, *Jasper*, *Andrew* and *Walter*, the present appellant. The two first dying without issue, and the last of them in 1716, the appellant from that time, as heir to his said father and brothers, and as executor to his mother, who was the surviving trustee of the 500 years term, received the rents, issues and profits of the trust estate, charged with the said 1400*l.* and with the said bond debts, and all other debts and legacies of *Jasper Radcliffe* his father.

On the 18th of May, 1721, the said *Martha Radcliffe* married Mr. *John Fursman*, Clerk, with the consent of her mother; but by articles dated and executed the day before such marriage, and to which the appellant was a party, as a trustee for the said *Martha* his sister; it was agreed, that the said 1400*l.* should be to the separate use of *Martha* for life, or as she should appoint; or otherwise to the issue of that marriage, as directed by those articles: And that whatever other real or personal estate should come to the said *Martha* from *Martha Mannaton*,

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or otherwise, should belong to her the said *Martha*, and be to her separate use; and should be vested in the appellant and *Francis Gregor*, Esq; for her separate use, and for such other uses, as she should by will or writing appoint.

Accordingly Mrs. *Fursman*, by her will dated the 19th of May, 1723, after some particular legacies, gave the residuum of her personal estate to the appellant and *Francis Gregor*, and other trustees therein named, in trust for the child she then was big with, which was the respondent; and made her husband executor, and died on the 4th of June, 1727, leaving the respondent her only child, and Mr. *Fursman* thereupon proved her will in the proper Ecclesiastical Court.

Francis Mannaton, Esq; executor of the said *Henry Mannaton*, being satisfied that the bonds were originally the separate property of *Martha*, the wife of the said *Henry Mannaton* his testator, on the 19th of October, 1728, declared the same under his hand and seal, and that they therefore belonged to the respondent. — And *John Towgood*, administrator *de bonis non* of *Jane Davy*, the obligee in one of the said bonds, by writing dated the 21st of January, 1728, and *Thomas Mordaunt* and *Mary* his wife, formerly *Mary Andrews*, the obligee in the other of the said bonds, declared, by writing under their hands dated the 13th of November, 1728, that the said bonds belonged to the respondent by title under the said *Martha Mannaton*, for whom the said *Jane Davy* and *Mary Andrews* were trustees, and to whom they were near relations.

Application being made to the appellant on behalf of the respondent, for payment of the said legacy and bonds; and he having refused to pay the same; a bill was, in Easter term, 1729, exhibited against him in the Court of Chancery, in the name of the respondent, by her next friend, to compel him to pay the same.

This bill charged, that the appellant well knew or believed, that these bonds were never paid; and as a demonstration thereof, that the appellant himself, or some person on his behalf, so declared or stated in some case for the opinion of some counsel; but to conceal the truth of such case, he stated the same by way of A. B. and C. and other letters, and in particular stated, that A. B. *innuendo* the said *Jasper Radcliffe* the father, died about

four years after giving two bonds, *innuendo*, the said two bonds, without payment thereof: And further stated, that the eldest son of the said *A. B.* died about seven years after his father, without paying any part of the principal or interest due on the said bonds; and then consulted, whether length of time would not prejudice the respondent's right to the said bonds. The bill therefore required a particular discovery of these facts, and that the said case might be set forth *in hæc verba & literas*.

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To so much of this bill, as required the appellant to set forth *in hæc verba & literas*, the said case stated by him for the opinion of council, or to what council such case was stated, or what opinion was given thereon, he demurred; alledging for cause, that the plaintiff was not entitled to any such discovery, and that the opinion was taken for the appellant's own private use and satisfaction.

This demurrer being argued before the Lord Chancellor *King*, on the 3d of *March*, 1729; his Lordship was pleased to over-rule the same as to setting forth the said case, but to allow it as to all other matters.

The appellant therefore appealed from so much of this order, as over-ruled the first part of his demurrer; contending, that cases stated for the opinion of counsel, were intended for private instruction and information only, in order to direct parties in the conduct of their affairs, and were frequently stated only on a supposition of facts, for the purpose of introducing the questions proposed; and it would be of the utmost consequence to the property of many families, if any person by a meer suggestion in a bill in equity, should be allowed to compel a defendant to set out the state of such case or cases, as he might have thought fit to frame for his own private direction, or that his agents might have thought fit to frame for him; and if a precedent of this kind was once established, it would become a common suggestion in all bills in equity. That by the law, and the known practice of all Courts of law and equity, no counsellor or attorney can be obliged, or ought to discover any matter which his client reveals to him, or which he knows only from the information of his client; and this is the privilege of the client, and not of the counsel or attorney: But if the expedient in the present case should take place, all this precaution of the law would be eluded, and the client might, upon a bare

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suggestion, be compelled to discover, not only a case stated for the opinion and advice of counsel, but by parity of reason, a brief, or any other instructions given to his counsel or attorney, and even what had passed at a consultation with them. That the respondent did not merely seek a discovery of some particular fact or circumstance supposed to be stated in the case, but required the whole to be set out in the very words and letters of it; whereas it often happens, that many matters are contained in cases stated for counsel, which no way concern the person seeking such discovery; and this might be the case at present, for any thing that appeared in the cause to the contrary. It was therefore prayed, that such part of the demurrer as had been over-ruled, might be allowed.

C. Talbot,
L. Stucley.

On the other side it was said, that the state of the case was alleged to be, touching bonds which were due to the respondent, and payable by the appellant; and surely a creditor is entitled in a Court of Equity, to have a discovery from a debtor, whether the debt be justly due or not; and for that purpose, to know what the debtor may have written, done, or said concerning the same; and such a discovery it was highly reasonable to require in a case like the present, where the principal defence relied upon, is a presumption of satisfaction arising from the length of time. That the state of the said case was in a matter, where the appellant was not merely concerned in his own right, but as a trustee of the bonds for the respondent, and a trustee also of the estates liable to the payment of them; and besides, no inconvenience could possibly arise to him from making such discovery but paying the bonds, upon its appearing that they were really due.

ORDER
affirmed.
Jour. vol 23.
p. 607.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the order therein complained of, affirmed.

Thomas

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Thomas, Lord Viscount Fauconberge and Catherine, Lady Viscountess Fauconberge, his Wife, } Appellants.

Case 79.

Richard Fitzgerald, Esq; and Rebecca his Wife, Walter Lord Aston and Charles Fowler, Esq; } Respondents.

27th February, 1730.

WILLIAM Fowler, Esq; deceased, had two sisters, *Dorothy* and *Magdalen*; *Dorothy* married *Mr. John Grove*, who had issue by her *Thomas Grove, Esq;* the respondent *Rebecca's* father; and *Magdalen* married one *Cassey*, who had issue by her a daughter named *Mary*, who married *John Betham*, and they had issue a daughter, the appellant *Lady Fauconberge*. *William Fowler* being unmarried, and having no child, and seised in fee of the manor of *St. Thomas*, in the county of *Stafford*, and several lands and hereditaments there and in several other counties, of 2300*l.* per ann. he, by lease and release, dated the 2d and 3d of *July*, 1712, as well for settling the said manors and premisses in his name and blood, to the several uses, trusts and purposes, and in such manner as therein after limited; "with liberty, nevertheless, to and for him the said *William Fowler*, freely and clearly, at his will and pleasure, "to dispose of, change or alienate the said manors, hereditaments and premisses, or any part thereof, for any estate or "estates whatsoever, as he should think fit, and to revoke, "recall and make void all and every the use and uses, trusts, "limitations and appointments thereby raised, limited and "appointed, mentioned and declared concerning the same;" as also in consideration of 5*s.* conveyed to the respondent *Lord Aston*, (then the Honourable *Walter Aston, Esq;*) *Thomas Giffard, Esq;* and the respondent *Charles Fowler* and their heirs, all the said manors and premisses, to the use of himself for life, without impeachment of waste; remainder to the trustees, for 500 years, upon the trusts therein after declared; remainder to the heirs of the body of the said *William Fowler*; remainder to the said *John Betham* for life, without impeachment of waste; remainder

Fitzgibbon's
Rep. 207.
Viner, vol. 5.
p. 518. note 10
ca. 12.
Lilly's Pract.
Conv. 391.
2 Eq. ca. ab.
p. 674. ca. 12.
677. ca. 3.

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remainder to the trustees, for the life of the said *John Betham*; remainder to his first and other sons by the said *Mary*, in tail male; remainder to all and every the sons of the said *Mary Betham* in tail male; remainder to the eldest son of the said *Thomas Grove*, which should be living at the time of failure of such issue male of *John Betham*, for life, without impeachment of waste; remainder to the trustees to preserve contingent remainders; remainder to the first and other sons of such eldest son of the said *Thomas Grove* in tail male; remainder to all other the sons of the said *Thomas Grove*; remainder to the appellant Lady *Fauconberge*, (then *Catherine Betham*) the daughter of the said *John Betham*, for life; remainder to the trustees to preserve contingent remainders; remainder to the first and other sons of *Catherine* in tail male; remainder in like manner to all other the daughters of *John Betham* on the body of *Mary*; remainder to *Dorothy*, the eldest daughter of the said *Thomas Grove* for life; remainder to the trustees to preserve contingent remainders; remainder to the first and other sons of the said *Dorothy Grove* in tail male; remainder to all other the daughters of *Thomas Grove* successively in tail male; remainder to the right heirs of the said *William Fowler* for ever.

These several remainders were limited to the several persons aforesaid, on his, her and their taking successively the surname of *Fowler*, and writing themselves and calling their children by that and no other surname; and the persons to whom the said daughters should severally marry, were also to take on them in like manner the surname of *Fowler*, and call their children by that name.

The 500 years term was upon trust, that the trustees should, out of the rents and profits of the premises, pay to the said *Dorothy Grove*, sister of the said *William Fowler*, 300*l.* per ann. and to the said *Thomas Grove* her son 200*l.* per ann. for their several lives, clear of taxes; and also thereby, or by sale, mortgage or demise thereof for the 500 years, or any part thereof, to raise all such sums as the said *William Fowler* should owe at his decease; and also all such sums as he, by his last will, or any other deed or writing executed under his hand and seal, in the presence of two or more witnesses, should give and appoint to be paid, or charge the premises with, to any person

or persons whatsoever: But if the person next in remainder, expectant on the term, should pay all the said debts, annuities and monies, so to be devised or appointed, then the term was to cease.

And in the indenture of release, were contained the following provisos, viz.

I. A proviso or power for the said *William Fowler*, from time to time, by any deed or writing under his hand and seal, to be signed and duly sealed and delivered in the presence of two or more witnesses, to demise, lease, limit or appoint the said manors and premises, or any of them, to any person or persons whatsoever, for any term or terms whatsoever, for so much yearly rent as the said *William Fowler* should think fit, and with such other conditions and agreements, as the said *William Fowler* should please.

II. A proviso, that if the appellant *Catherine*, or any other daughter of the said *John* and *Mary Betham*, or *Grove*, eldest daughter of the said *Thomas Grove*, or any other daughter of the said *Thomas Grove*, who, according to the said limitations, ought to inherit the premises, should marry any person, without the consent of the trustees, or the survivors of them, or should marry any person who should be a protestant, and not of the communion of the church of *Rome*; that then and immediately after such marriage, all the estates before created and appointed for the benefit of such person, so marrying, should cease and be void.

III. And another proviso in these words, viz. "That it shall and may be lawful to and for the said *William Fowler*, at any time or times during his natural life, at his will and pleasure, to grant, sell or demise the hereby granted premises, or any part thereof; or by any deed or writing under his hand and seal, or by his last will and testament in writing, signed, sealed, and delivered and published in the presence of three or more credible witnesses, to revoke, repeal and make void all, every, or any the use and uses, estate and estates, trusts and limitations before raised, created, limited or appointed; and to declare and limit the same, or such other new uses, as shall seem most meet and convenient to the said *William*"

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“ *William Fowler*; and then and from thenceforth, the estates
 “ and uses before limited and appointed, and so revoked and
 “ repealed, to cease and determine and be utterly void, as if
 “ the same had never been made, limited and appointed; and
 “ that the said *William Fowler* shall and may dispose of the
 “ same premises, and every part and parcel thereof, to such
 “ other person and persons, use and uses, as he shall think fit,
 “ any thing before mentioned to the contrary in any wise not-
 “ withstanding.”

By other indentures of lease and release, dated the 25th and 26th of September, 1715, made between the said *William Fowler* of the one part, and *John Tombs*, Doctor in physick, and *Edward Ward*, Gent. of the other part; reciting, that the said *William Fowler* did really stand indebted to the several persons named in a schedule thereunto annexed, in the several sums therein mentioned; he, as well for better securing the said debts, and more speedy payment thereof, and in consideration of 5s. as also for other good causes, conveyed to the said *John Tombs* and *Edward Ward* and their heirs, the said manors and premises; upon trust, that they or the survivor of them, or the heirs and assigns of such survivor, should, out of the rents and profits of the premises, or by mortgage or sale thereof, or by any other ways as to them should seem meet, raise so much money as should be sufficient to pay all the debts mentioned in the said schedule, with such interest as should be due to the several persons therein named, over and above the several annuities, rents and rent-charges in the said schedule mentioned, wherewith the same premises stood charged, and pay the same in full discharge of the said debts and interest; and after payment thereof, and their own charges being satisfied, that “ they should pay the overplus thereof (if any) and
 “ reconvey such part of the premises, as should remain unsold, to the said *William Fowler*, or to such person and persons, and to such use and uses, estate and estates, as the said
 “ *William Fowler* should, by any deed or writing under his
 “ hand and seal, attested by two or more credible witnesses,
 “ limit, direct and appoint the same.”

This indenture of release was attested only by two witnesses, and remained in the custody of *Ward* the trustee, till his death.

By

By another indenture, dated the same 26th of September, 1715, executed by all the said three parties, reciting the lease and release of the 25th and 26th of September, 1715; it was declared, that it should and might be lawful for the said *William Fowler*, at any time or times thereafter during his life, at his will and pleasure, by any deed or writing under his hand and seal, attested by two or more witnesses, or by his last will in writing, attested by three or more witnesses, to revoke, repeal and make void, all or any of the trusts and estates in the said indenture of release of the 26th of September, 1715, raised, created, limited and appointed of the said premises, and every part thereof; and to declare, limit and appoint the same to such other use and uses, as should seem most meet and convenient to him; and that from thenceforth, the trusts and estates so revoked and repealed, should cease and be void, as if the same had never been created, limited, or appointed; and that it should and might be lawful for the said *William Fowler*, to dispose of the same premises, or any part thereof, to such other person and persons, use and uses, as he should think fit.

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On the 24th of January, 1716, *William Fowler* died without issue; and having made no appointment or disposition of the estate, after the execution of the deeds of 1715, the trust of the whole estate descended to his heirs at law: But the deeds of 1715 being not then discovered, *John Betham*, who married *Mary* the daughter of *Magdalen Casey*, taking advantage thereof, immediately upon the death of *William Fowler*, entered on the estate, and received the profits during his life.

In November, 1719, this *John Betham* died without issue male, leaving *Mary* his widow, and the appellant *Catherine* his daughter: Whereupon the widow took administration to him, and possessed his personal estate; and by the connivance, or permission of the said *Edward Ward*, who all along acted as agent for that family, she, as guardian to her said daughter, received the rents of the real estate till her death, which happened about July, 1725.

In 1721, *John Tombs*, one of the trustees in the settlement of September, 1715, died; and in November, 1724, *Edward Ward*, the surviving trustee in that settlement, also died. Soon after whose death, *Christopher Ward* his son and administrator, found among

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his father's writings, the said deeds of *September, 1715*; and apprehending them to be of consequence to the family, he brought them up to *London*, to the respondent Lord *Aston*; who desired Mr. *Ward* to go with him to Mr. *Pigott*, to advise upon those deeds on behalf of the appellant *Catherine*; and Mr. *Pigott*, having read the same, seemed much dissatisfied, apprehending them to be to the disadvantage of the appellant *Catherine* and her family; and finding on enquiry, that *Edward Ward* had survived Dr. *Tombs*, he said, that by these deeds the trust estate was vested in the heir at law of *Edward Ward*, and that he apprehended Lord *Aston* and Mr. *Fowler* had no power to act further as trustees under the settlement of 1712; for that as the said *William Fowler* had a power of revocation in the first settlement, these deeds of 1715 would be deemed a revocation of the same; and thereupon asked *Christopher Ward*, whether he believed his eldest brother *Edward* would assign his trust to Lord *Aston* and Mr. *Fowler*? Who answering, that he certainly would, Mr. *Pigott* desired him to prepare a proper deed for that purpose.

Accordingly, by lease and release dated the 20th and 21st of *August, 1725*, the said *Edward Ward* the son, conveyed the premises to the respondents Lord *Aston* and Mr. *Fowler*, and their heirs, upon such trusts as he the said *Edward Ward* might have held the same.

In the year 1726, a treaty was set on foot for a marriage between the appellants; on which occasion, Mr. *Pigott* was counsel for Lord *Fauconberge*, and Mr. *Ward* was counsel for the Lady and the respondents the trustees; and by lease and release dated the 1st and 2d of *August, 1726*, reciting the intended marriage, in consideration thereof, and of the great estate in land to which the appellant the Viscountess was entitled, and which was therein mentioned to be settled on her, and the issue of her body to be begotten; and for settling a jointure on her if she survived the appellant the Lord Viscount, in bar of her dower; his Lordship conveyed certain manors and lands therein mentioned, to trustees for the benefit of the appellant the Viscountess and the issue of the marriage; with a power thereby reserved to himself, to revoke all the uses in this settlement, with consent of the trustees, except the provision for the Viscountess.

On the 5th of *August*, 1726, the marriage was had; and thereupon the appellant Lord *Fauconberge* entered upon the estate in question, and received the arrears and growing rents thereof.

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Thomas Grove being one of the coheirs of *William Fowler*, and as such entitled to a moiety of the said estates, subject to *Fowler's* debts, according to the settlement of 1715; the respondent *Fitzgerald*, in the year 1727, entered into a treaty with him for a marriage with the other respondent *Rebecca* his only child; and in consequence thereof, by articles of agreement dated the 2d of *February*, 1727, between the said *Thomas Grove*, and the respondent Mr. *Fitzgerald*, reciting, that the said *Thomas Grove* in coparcenary with Lady *Fauconberge*, was well entitled to an undivided moiety of the said *William Fowler's* real estate, and that a marriage was shortly to be had between the respondents *Richard* and *Rebecca*: In consideration of the intended marriage, and for other considerations therein mentioned, *Grove* covenanted to convey all his undivided moiety of the said estate, to the uses therein mentioned. And after the marriage was had, *Grove*, in performance of this covenant, by lease and release dated the 28th and 29th of *February*, 1727, conveyed his undivided moiety of all the said manors and premisses to trustees and their heirs, to the intent that the said *Thomas Grove* and *Rebecca* his wife might, during their lives and the life of the survivor, receive a rent-charge of 350*l.* per ann. clear of taxes; and subject thereto, to the use of the respondents *Richard Fitzgerald* and his wife, for their lives and the life of the survivor; remainder to the trustees to preserve contingent uses; remainder to their first and other sons in tail male; remainder to their daughters as tenants in common in tail; remainder to the said *Thomas Grove* and his heirs.

On the 3d of *April*, 1728, the respondents *Fitzgerald* and his wife exhibited their bill in Chancery, against the appellants and the Lord *Aston*, *Charles Fowler*, the said *Thomas Grove*, who was the administrator *de bonis non* of *William Fowler*, and the said *Edward Ward*, son and heir of *Ward* the surviving trustee, for a discovery of the said settlements, and all other writings relating to the estate, and to have their title to an undivided moiety thereof established; and for an account of the rents and profits thereof,

thereof from the death of *William Fowler*, and also of his personal estate, and that the trusts created by him might be executed; and that after the payment of his debts, the parties who had the legal estate, might join in making proper conveyances of a moiety thereof, according to the respondent's marriage settlement.

To this bill the appellants put in a plea and answer; and as to so much of the bill, as sought to impeach their title to any of the estates which were formerly the inheritance of *William Fowler*, or of any share thereof, or to have an account of the rents and profits, or any relief concerning the same; they jointly pleaded the settlement of the 2d and 3d of *July*, 1712, and also the settlement of *August*, 1726, made on their marriage. And by their answer said, that before their marriage, or making the settlement of the appellant the Lord Viscount's estate, they had not any notice of the deeds of *September*, 1715, nor till about eleven months after their marriage; and insisted, that the settlement of *September*, 1715, being attested only in the presence of two witnesses, could not in any sort amount to a revocation of any of the uses or estates, created or appointed by the settlement of *July*, 1712. And that in case *Mr. Pigott*, who was counsel for the appellant the Viscountess, in preparing the marriage settlement, had notice of the settlement of 1715, it was as counsel for the respondents the Lord *Aston* and *Mr. Fowler*; and the appellant the Lord Viscount did by his answer insist, that he was a purchaser, or in the nature of a purchaser, during the joint lives of him and his said wife, of all the estates of the said *William Fowler*, by virtue of his marriage and the settlement by him made.

On the 17th of *December*, 1723, the plea was argued before the Lord Chancellor King; when the same was ordered to stand for an answer, with liberty to except to any thing therein, save as to matters of account; and the benefit of the plea was saved till the hearing of the cause.

The respondents replied, and the cause being at issue, witnesses were examined on both sides, and publication having passed, the cause was heard on the 6th and 8th of *December*, 1729, before the Lord Chancellor, assisted by the Master of the Rolls and the Lord Chief Baron *Reynolds*; who, after having taken time to consider, concurred in opinion, and on the

12th of June, 1730, unanimously declared, that the deed of July, 1712, was revoked by the deed of September, 1715; and that on the death of *William Fowler*, the estate in fee, subject to the incumbrances contained in the schedule annexed to that deed, descended to his heirs at law *Thomas Grove* and *Mary Betham*; and that the moiety belonging to *Mary Betham*, was then descended to and vested in the appellant the Lady Viscountess *Fauconberge*, in fee; and that the respondents *Mr. Fitzgerald* and his wife were entitled to the other moiety belonging to the said *Thomas Grove*, according to the uses of the deed of the 29th of February, 1727. And it was referred to the Master, to take an account of the rents and profits of the estates contained in the said settlements of 1712 and 1715, received by the appellant the Lord Viscount; and also an account against all parties, of the personal estate of *William Fowler*; and likewise an account of the debts and incumbrances on the estate, and what was due thereon, and to enquire into the reality of the debts, and whether any and which of them had been paid, and by whom and out of what: And the personal estate of *William Fowler* was, in the first place, to be applied towards payment of the said debts; and if that were not sufficient, that the residue thereof should be satisfied out of the said rents and profits; and if those should not be sufficient, then a sale was decreed of a sufficient part of the real estate, with the approbation of the Master, to satisfy the remainder of the said debts. And the residue of the lands unsold, were to be divided between the respondents *Mr. Fitzgerald* and his wife and the appellants, and a commission was to issue for that purpose; and after such commission and partition, the respondents the Lord *Aston* and *Mr. Fowler* should (subject to the annuities contained in the schedule annexed to the indenture of September, 1715) convey one moiety to the appellant the Lady Viscountess and her heirs, and the other moiety to such uses and trusts as were mentioned in the deed of February, 1727. And if there should be any surplus profits remaining in the hands of the appellant the Lord Viscount, he was to retain one moiety thereof to himself, and to pay the other moiety to the respondent *Mr. Fitzgerald*; and so far as the appellant the Lord Viscount had paid the 200*l.* per ann. to *Thomas Grove*, so far he was to have a deduction for the same out of the plaintiff's moiety; and the rents in arrear in the tenants hands, and the growing rents and profits till such sale and partition, were to be paid, one moiety

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to the respondents Mr. *Fitzgerald* and his wife, and the other moiety to the appellant the Lord Viscount: And all deeds and writings relating to the real estate, were to be brought before the Master on oath, and after the partition made, either party was at liberty to apply to the Court for directions touching the delivering back of such deeds. And the bill, as against the Lord *Aston* and Mr. *Fowler*, was dismissed with 40s. costs, but without prejudice to the then plaintiffs, or the appellants bringing any new bill for an account of the rents and profits of the estate; and the defendant *Ward* was to join in the conveyance, if desired.

C. Talbot.

W. Hamilton.

From this decree Lord and Lady *Fauconberge* appealed; and on their behalf it was argued, that his Lordship having settled a great estate upon his Lady and the issue of that marriage, every way adequate to the whole estate of Mr. *Fowler*, upon the credit and in consideration of Mr. *Fowler's* estate being settled on her, and not having notice of the release of *September, 1715*; he ought to be considered as a purchaser under Mr. *Fowler's* settlement, of the benefit of the limitations therein contained to Lady *Fauconberge* and the issue of the marriage: And that Lord *Aston* and Mr. *Charles Fowler*, the trustees in the settlement of 1712, having, in support of that settlement, obtained a conveyance from the heir of the surviving grantee in the release of 1715, ought to be considered as trustees for the appellants; and therefore a Court of Equity ought not to take away the legal estate from them, in favour of the respondents Mr. and Mrs. *Fitzgerald*, and in prejudice of the appellant Lord *Fauconberge*, an innocent purchaser. That the lease and release of *September, 1715*, being executed in the presence of two witnesses only, ought not to be construed a revocation of the settlement of 1712. For the clause in which the power of revocation was reserved was one entire sentence, and the circumstances with which *William Fowler* thought fit to have his revocation of so solemn a settlement attended, were applicable to every method of executing that power; it was unreasonable therefore to imagine, that he intended an express revocation should not be good, unless those circumstances were observed, but that an implied revocation should take place, tho' unattended by any of them. That the construction contended for by the respondents, supposed the first part of the proviso (to grant, sell or demise any part of the premises) to be a distinct sentence, and a different branch of power, unconfined to the ceremony of execution in the

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the presence of three witnesses, and to enable Mr. *Fowler*, by a grant, which required neither signing or attestation, but only sealing and delivery, to revoke the whole settlement; but those words, if taken as a distinct sentence, were incomplete, and the construction put upon them was neither consistent with the intention of the proviso itself, or with several other clauses in the deed. For it would render the greatest part of the power which followed these words, nugatory and useless; because there was scarce any thing, which, by the subsequent part of the clause, he was impowered to do, under the restrictions therein limited, but what he might in effect do by those previous words, without any restriction at all. Further: The clause for raising such sums out of the estate, as Mr. *Fowler*, by will or deed executed in the presence of *two* witnesses should appoint, and the power of leasing, by deed or writing under hand and seal, executed in the presence of *two* witnesses; had in vain directed those ceremonies to be observed in the execution thereof, if, by the respondents construction, Mr. *Fowler* might do both, without observing either of those ceremonies: And it was impossible to conceive, that by the words, "grant, sell, or demise," he intended to reserve a general power of demiseing the premises, even for the longest term of years, without any signing or attestation of such lease; when, by the clause inserted for that particular purpose, he had expressly confined his power of leasing, even for one year, to the ceremony of signing such lease in the presence of two witnesses. On the contrary, it seemed to be Mr. *Fowler's* intent, not only to reserve a power of revocation, but also to confine the execution of it to particular ceremonies, in order to ascertain what act of his should or should not be deemed a revocation of the settlement, which he had so deliberately made; and the ceremony of attestation by three witnesses, being with propriety applicable to the whole proviso, and consistent with all the other parts of the deed, it seemed to be a natural construction that it should extend to the whole clause.

In aid of these arguments it was said, that there was the less reason to consider the deeds of 1715, as a revocation of the settlement of 1712, because they were executed at a time when Mr. *Fowler* might think it proper to execute some conveyance to protect his estate; and he seemed industriously to have avoided the solemnity of three witnesses, lest that should operate as a

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 revocation of the settlement of 1712, which it did not appear he had any intention to vary. But if the deeds of 1715 should be deemed to be any revocation of the settlement of 1712, yet they could not be a total revocation; because it was admitted, that those deeds operated only as an implied revocation, by reason of their inconsistency with the settlement of 1712, and therefore were no further a revocation, than such inconsistency extended: Now the release having conveyed the premises, in trust to raise money for paying the debts mentioned in a schedule thereunto annexed; and afterwards to reconvey to Mr. Fowler, or such persons and uses as he should appoint, without saying to William Fowler or his heirs, or limiting the estate in default of appointment, which was the case that had happened; it was apprehended, that the release of 1715, was no further inconsistent with the settlement of 1712, than as to the particular uses specified in that deed, and consequently, as to the rest of the estate, did not revoke the settlement of 1712; and that under these circumstances, a Court of Equity ought to restrain it from operating any further, than to satisfy the particular purpose.

P. Yorke.

T. Lutwyche.

To all this it was answered, that there could be no pretence to make Lady Fauconberge a purchaser, neither was there any purchase made by Lord Fauconberge, or any conveyance, or agreement for a conveyance; and without some of these circumstances, pleas of this kind have never been allowed in Courts of Equity. That this was a case the less proper for such a plea, because the appellants had no legal title, nor any legal incumbance to protect their supposed equity; the legal estate being in the trustees, and the only question being, for whom they are trustees: If the right to the trust appeared to belong to the respondents, it was apprehended, a Court of Equity could not, contrary to that right, compel the trustees to convey to the appellants; and if the Court would not compel an execution of the trust to the respondents, the consequence would be, putting the estate absolutely in the power of the trustees themselves, who might at any time recover the possession by ejectment. That it appeared from the whole tenor of the settlement of 1712, that William Fowler intended to retain an absolute power, notwithstanding that settlement, to dispose of the whole estate at his will and pleasure, by such conveyances as he should think fit, without confining himself to do it in the presence of any number of witnesses, or with any particular circumstances.

This

This intention was shewn by the introductory part of the deed being interwoven with the consideration; and pursuant thereto he took care to have the third proviso inserted in the body of the deed; by which it was made lawful for the said William Fowler, at any time during his life, at his will and pleasure, to grant, sell, or demise the premisses, or any part thereof: And the same proviso concludes with these general words, *that the said William Fowler shall and may dispose of the premisses, and every part and parcel thereof, to such person and persons, use and uses, as he shall think fit, any thing before mentioned to the contrary notwithstanding.*

That this last sentence was independent of the preceding branches, and the different powers reserved to Mr. Fowler by this deed, were neither repugnant or useless; for as some things therein contained, were of such a nature as might make him desirous to keep it secret; so it was plain he intended to have it in his power to defeat that settlement, by conveying the estate to uses, different from the uses thereby limited, without being under the necessity of referring to it, or taking any notice of it. And this construction was the more reasonable, inasmuch as powers reserved to the owner of an estate, have always been liberally expounded, so as to answer his intention, as being part of his ancient right and dominion over the estate. That William Fowler having, by the deeds of 1715, conveyed the fee and inheritance of the whole estate to Dr. Tombs and Mr. Ward, upon trusts and for uses utterly inconsistent with those of the settlement of 1712, this latter conveyance must consequently be a compleat revocation of the former; the legal estate being vested in new trustees, who could be seised thereof upon no other trusts than the new ones: And Mr. Fowler having made no subsequent appointment of such part as should remain unsold, after the particular purposes were answered, a trust must therefore necessarily result for the benefit of him and his heirs, according to the established rules both of law and equity; consequently, there could be no foundation for a Court of Equity to controul or abridge the operation of the deeds of 1715, by construing them to be only a revocation *pro tanto*, merely to disinherit one of the coheirs at law. It was therefore hoped, that the decree would be affirmed, and the appeal dismissed with costs.

AFTER hearing counsel on this appeal on Friday the 26th of February, the following question was proposed to the Judges,

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affirmed.
Jour. vol. 23.
viz. p. 624.

viz. "Whether the deed of 1715 be a revocation of the deed of 1712; and if so, whether the said deed of 1715 be a total revocation, or only a revocation *pro tanto*?" And the Judges having, on the next day, delivered their opinions *seriatim* upon this question, it was ORDERED and ADJUDGED, that the appeal should be dismissed; and the decree therein complained of, affirmed*.

Case 80.

Edward Tong, Clerk, and William We-

kett, Clerk, - - -

Appellants.

Ralph Robinson, Esq; Edward Harle,

Gent. and Others, Creditors of John

Respondents.

Tong, Clerk, deceased †,

23d March, 1730.

JOHNSON Tong, Clerk, Rector of *Brancepeth*, in the county of *Durham*, being indebted to the respondents and several other persons, by judgments, bonds and simple contract, in great sums of money, in July, 1727, died intestate and without issue; seised in fee of a real estate of about 200*l.* *per ann.* and of the trust or equitable interest of the perpetual advowson of the rectory of *Brancepeth*, of the yearly value of 400*l.* and possessed of a small personal estate.

After the death of *John Tong*, administration was granted to *William Dun*, one of his creditors; and in *Michaelmas* term, 1727, the respondents, on behalf of themselves and other the creditors of *John Tong*, exhibited their bill in the Court of Chancery against the appellants and against *Margaret Tong*, the

* In a manuscript note on this case it is said, that after hearing the opinion of the Judges upon the question, it was proposed to reverse the decree; and that the question being put, it was resolved in the negative: Contents 22; Non-contents 13.—But no such question or division appears in the Journal.

† Mr. *Peere Williams* and the several other reporters of this case, have taken it up subsequent to the determination of the present appeal. See 3. *P.W.*

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intestate's

*M.P.
S.C. ch 3. Fin.
Apr. 1735. Reited
in 2. P.W. 206.
S.C. ch 3. in 2.
Apr. 1739.*

intestate's widow, *William Dun* the administrator, *Robert Richardson*, in whom the legal estate of the advowson was vested, and *James Carr* and *Ann* his wife, mortgagees of part of the real estate of the intestate, praying a discovery and account of the real and personal estate of the intestate; and that the defendants might set forth what title they had or claimed to any part of the real estate, and that all the said real estate might be sold, and the money applied for payment of the just debts of the said *John Tong*.

To this bill the several defendants put in their answers; and the appellants, by their answer, set forth the case with respect to the advowson of the rectory of *Brancepeth* to be as follows, viz. That *William Fenwick* and *Thomas Swinborne*, Esqrs. being seised in fee of the said advowson, in the year 1700 contracted with *John Tong* for the absolute sale thereof for 860*l.*; but he, not having the purchase money ready, borrowed the same of *Robert Fairbeard*, Esq; and it was thereupon, to save expence in conveyances, agreed that *Fenwick* and *Swinborne* should convey the said advowson to *Fairbeard* and his heirs, as a security, in the first place, for repayment of the said 860*l.* with interest, and subject thereto, in trust for *John Tong* and his heirs. — That by deed inrolled, dated the 20th of *February*, 1700, made between *Fenwick* and *Swinborne* of the first part, *Fairbeard* of the second part, and *John Tong* of the third part; *Fenwick* and *Swinborne*, in consideration of 860*l.* by the direction of *John Tong*, granted and conveyed the said advowson unto *Robert Fairbeard* and his heirs; in which deed was contained a proviso and covenant from *Fairbeard* to *Tong*, that upon payment of 860*l.* with interest, *Fairbeard* and his heirs would convey the advowson to *Tong* and his heirs. — That *Tong*, in his life-time, paid the 860*l.* and all interest for the same, but that *Fairbeard* died, without conveying the advowson to him, whereby the legal estate thereof descended to *Robert Richardson*, as nephew and heir at law of *Fairbeard*. — That *John Tong* died intestate, without issue, in *July*, 1727, and before *Richardson* had conveyed the legal estate of the advowson to him; and that by his death, the said advowson, or the right and interest which *Tong* had therein, descended and came to the appellant *Edward Tong*, as his brother and heir at law. — That *John Tong*, being incumbent of the said church of *Brance-*

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petb, the same, by his death, became vacant; and thereupon the appellant *Edward Tong* presented the other appellant *William Wekett*, his Clerk, thereto, who was thereupon duly admitted, instituted and inducted; and that the appellant *Edward Tong* afterwards, by indenture dated the 8th of November, 1727, for the consideration therein mentioned, conveyed the said advowson to the appellant *Wekett* and his heirs, to his and their own use.

After having thus stated the facts of the case, the appellant *Edward Tong* insisted, that the advowson was not affixed liable to pay the respondents demands, and that he ought not to be compelled to join in the sale thereof, for the benefit of his brother's creditors, or to direct the other defendant *Richardson* so to do; and the appellant *Wekett* insisted on enjoying the same, according to the conveyance made thereof to him by the other appellant. — The appellant *Edward Tong* also insisted, that his brother *John Tong's* real estate was charged with an annuity or rent-charge of 80*l.* *per ann.* payable half yearly to the said appellant *Edward* and *Susannah* his wife, and the survivor of them, clear of all deductions during their lives, and the life of the survivor of them; and that there was then due and in arrear for the said annuity, 412*l.* 5*s.*

The defendant *Richardson*, by his answer, alledged, that the advowson was conveyed by *William Fenwick* and *Thomas Swinborne* to *Robert Fairbeard* and his heirs, subject to a condition, that if *John Tong* should pay *Fairbeard* 911*l.* 12*s.* at the time mentioned in the conveyance, that then *Fairbeard* should convey the advowson to *John Tong* and his heirs: But that this condition was never performed by *Tong*, and that *Fairbeard* being dead, the advowson vested in the defendant *Richardson* and his heirs, as heir to *Fairbeard*.

The defendant *Margaret Tong*, by her answer, insisted, that she was entitled to dower out of her husband's real estate. — And the defendants *Carr* and his wife, by their answer, insisted on a mortgage from the intestate of part of his real estate, for securing 900*l.* and interest.

The cause being at issue, came on to be heard before the Lord Chancellor *King* on the 6th of November, 1730; when his

his Lordship was pleased to order and decree, that it should be referred to one of the Masters of the Court, to take an account of what was due to the respondents and the other creditors of the intestate *John Tong*, and upon what particular securities; and the nature of their several debts; and also to take an account of the intestate's personal estate, which was to be paid to the creditors in a course of administration: And it was further ordered and decreed, that the Master should enquire into the real assets, either in law or equity, of the said *John Tong*; and that in taking of that account, *the said advowson should be considered as real assets, and should be sold to the best purchaser, to be allowed of by the Master, and that all proper parties should join in the sale thereof, as the Master should direct*; and the money arising by such sale, was to be paid to the judgment creditors, according to the priority of their judgments, and then equally among the bond creditors. And this decree was to be binding on the defendant *Richardson*, who made default and did not appear, unless he should shew cause to the contrary.

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From so much of this decree as related to the advowson, the appellants appealed; and on their behalf it was insisted, that the advowson was not assets at law, or at all liable to the demands of any of the creditors of *John Tong*; because at law, no inheritance is liable to any execution, that is not capable of raising some profits towards satisfaction of the debt, which an advowson is not: That therefore the advowson, in this case, ought not to have been adjudged assets in a Court of Equity, and especially where the bill was no more than in the nature of several actions of debt upon bonds, brought into one cause, to prevent a multiplicity of suits; for, in cases of this kind, equity follows the law, and can make no trust estate assets for the payment of debts, which would not have been assets at common law, if the legal interest thereof had been in the intestate; since the same rule of property ought to prevail in both.

P. Yorke.

N. Fazakerley.

On the other side it was contended, that at the common law an advowson in fee is an hereditament descendible to the heir, valuable in itself, and saleable; and even capable, if necessary, of having an annual value put upon it, and is therefore legal assets in the hands of an heir. That the present case was the stronger, in regard the legal estate in the advowson was not in the intestate at the time of his death, but in the heir at law of

C. Talbot.

T. Lutwyche.

Fair-

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Fairbeard; and consequently, the equitable inheritance only descended to the appellant *Edward*, as the intestate's heir at law, and became equitable assets in his hands, governable by the rules of equity. That this was a case between creditors, who are always favoured in a Court of Equity, and the appellant *Wekett*, as claiming the advowson under a voluntary conveyance from the appellant *Tong*; and that the creditors would, in all events, be great losers, for, even including the value of the advowson, there would be a great deficiency of assets.

DECREE
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Jour. vol. 23.
p. 047.

AFTER hearing counsel on this appeal, and hearing the opinion of the Judges present, in relation to a matter to them proposed; it was ORDERED and ADJUDGED, that the decree complained of, should be affirmed, with this addition, that in taking the account of the advowson as real assets, "the appellants" should have all just allowances."

Case 81.

John Gould and *Mary* his Wife, late
Mary Gliffon, *Conyers Place*, Jun. and
Magdalen his Wife, late *Magdalen*
Gliffon, and *Conyers Place*, Sen. } Appellants.

William Okeden, *Edmund Okeden*, *Peter*
Walter, *Thomas Hussey* and *John*
Bond, Esqrs. } Respondents.

1st April, 1731.

Grounds and
Rudiments of
Law and E-
quity, p. 89.
92. by the
name of Gould
v. Morgan.

BARTHOLOMEW Lane, having a wife and two daughters, and being seised in fee of several messuages and lands in *Semley* and *Tisbury* in the county of *Wilts*, and in *Wimborne* in the county of *Dorset*; by his will, dated the 5th of *May*, 1671, directed, that his wife should enjoy his dwelling house at *Wimborne*, so long as she remained his widow; and all the rest of his real estate he gave to trustees, on failure of his own issue male, in trust for his two daughters in tail, with divers remainders over. But by a settlement made subsequent to this will, dated the 18th of *March*, 1677, he settled his lands in

Semley

Semley and Tisbury on himself for life; remainder to trustees for 50 years, to raise out of the rents and profits 100*l.* per ann. for his wife, for her life; remainder, as to one moiety, to his daughter *Susan*; and as to the other moiety, to his daughter *Magdalen*, in fee.

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In the life-time of *Lane*, *Susan*, his eldest daughter, intermarried with *Robert Coker*; and after *Lane's* death, *Magdalen*, the younger daughter, intermarried with *William Okeden*, Esq.

And by indentures of lease and release, dated the 29th and 30th of *August*, 1687, in consideration of that marriage, and of 4800*l.* paid down as the marriage portion of *Magdalen* by her father's executors, *Okeden* and his father conveyed to trustees, several estates of 1200*l.* per ann. as to part, to the use of *William Okeden* for life, remainder to *Magdalen* for life, for her jointure; remainder to the first and other sons of that marriage in tail male; remainder to the heirs male of the body of *William Okeden*; remainder to *William Okeden* in fee: And as to the residue, to the use of *William Okeden* for life; remainder to trustees for 500 years; remainder to the first and other sons of the marriage in tail male; remainder to trustees for 600 years; remainder to *William Okeden* and the heirs male of his body; remainder to the heirs of the body of *William Okeden*; remainder to *William Okeden* in fee.—The trust of the 500 years term was declared to be, for raising portions for younger children, in case of a son and other children; but if there should be only daughters, that term was to cease: And the trust of the 600 years term was declared to be, that in case *William Okeden* should die without issue male, and leaving issue female, the trustees were, after his death, to raise portions for such issue female; and particularly, if but one daughter, 5000*l.* But such portion was not to become due, unless such only daughter should survive her father.

In the year 1679, *Bartholomew Lane* died; whereupon the fee simple and inheritance of all his real estate, except the dwelling house at *Wimborne*, was vested in the said *Susan* and *Magdalen* his daughters, in moieties: And *Mary*, his widow, having, in 1687, intermarried with one *Draycott*, *Susan* and *Magdalen* became thereby seised in fee tail of the said dwelling house in moieties.

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Magdalen Okeden died in *July*, 1688, leaving issue only one daughter named *Mary*; whereupon the said *William Okeden* became seised of a moiety of all *Lane's* real estate, as tenant by the curtesy. And in *June*, 1707, the said *Mary*, his only daughter, intermarried with *William Gliffon*; but this marriage was without the consent of, and displeasing to the father.

Gliffon being very careless and extravagant, and having contracted a debt of 170*l.* to one *George Pasben*; for securing the repayment thereof, he, and *Mary* his wife, by lease and release dated the 26th and 27th of *December*, 1715, and by a fine, conveyed to the said *Pasben* and one *George Clarke*, and their heirs, the reversion of an undivided moiety of her grandfather *Lane's* estate; in trust by sale or mortgage, to raise and pay the said *Pasben* 170*l.* and interest; and afterwards in trust for the said *William Gliffon* in fee.

William Gliffon's debts increasing, and he being under a necessity of selling the said estate for satisfaction thereof, frequent applications were made by him and his wife to *William Okeden* her father, to purchase their reversionary interest; and, after several treaties, they agreed at the price of 500*l.* In pursuance whereof, by indentures dated the 17th and 18th of *July*, 1716, executed by *Gliffon*, *Pasben* and *Clarke*, reciting the last mentioned indentures of lease and release, and that *Pasben* and *Clarke* had not raised the 170*l.* and that *Gliffon* wanted to raise other money, and had agreed that the premises conveyed to *Pasben* and *Clarke* should, for 500*l.* be granted and conveyed to the said *William Okeden*: It was witnessed, that in consideration of 174*l.* 10*s.* paid by *Okeden* to *Pasben*, and 325*l.* 15*s.* paid by him to *Gliffon*, and 10*s.* paid to *Clarke*; *Pasben* and *Clarke*, at the instance and request of *Gliffon*, conveyed to *Okeden* in fee, all the said premises conveyed to *Pasben* and *Clarke* as aforesaid; and the said *William Gliffon* thereby covenanted against incumbrances, except the said *William Okeden's* estate for life, as tenant by the curtesy; and also covenanted to make further assurance.

William Okeden being so seised of the said premises, and of a considerable real and personal estate, on the 29th of *January*, 1716, made his will; and thereby devised his personal estate, and particular parts of his real estates to the respondents,

Walter;

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Walter, Hussey and Bond, and *Joshua Churchill* deceased, in trust to be applied in payment of his debts and legacies, and the 5000*l.* to be raised by virtue of his marriage settlement; and he devised the residue of his real and personal estate to his said trustees, for the benefit of the respondents *William* and *Edmund Okeden* his natural children, successively in tail male; with remainder to his own right heirs.

On the 18th of September, 1718, *William Okeden* the testator died, leaving *Mary Glisson* his only daughter and heir at law; who died in January, 1719, leaving the appellants *Mary* and *Magdalen*, and one son, who afterwards died an infant and without issue.

In November, 1722, *William Glisson* died intestate; whereupon the appellant *Place* the elder took out letters of administration both to him and *Mary* his wife; and in May, 1725, the appellants brought their bill in the Court of Chancery, against the respondents and others, for an account of the real and personal estate of *Bartholomew Lane*; and particularly, for an account of profits of the estates at *Sembley*, *Tisbury* and *Wimborne*, conveyed to the said *William Okeden* as aforesaid, and also to set aside the conveyances thereof; suggesting, that *William Glisson* and his wife, being very necessitous, were imposed upon by *William Okeden* and his agents, and drawn in to execute the same for little or no consideration, being under the power and influence of *Okeden*, and on assurances of kindness and other promises, which were never made good. And the bill likewise prayed relief as to the raising the 5000*l.* provided by the marriage settlement of 1687, and sought also to impeach the will of *William Okeden*.

The respondents answered this bill, and the respondent *William Okeden* by his answer, set forth the conveyance to *William Okeden* of the estates at *Sembley*, *Tisbury* and *Wimborne*; denied the several charges of fraud and imposition, and insisted on the said purchase being made for a full and valuable consideration, and not obtained by fraud or imposition in any respect whatsoever.

On the 18th of May, 1728, the cause was heard before the Lord Chancellor *King*; who was pleased to decree, that what of the 5000*l.* was not raised, together with the interest thereof

from

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from the death of *William Okeden*, should be raised and paid out of his personal and trust estates; and directed the accounts to be taken for that purpose, with proper directions touching the same, and for the maintenance of the appellants, and placing out their monies for their benefit till their coming of age. And as to the deeds and writings of the real estate, they were to be produced upon oath before the Master, to be inspected by each side, who were to be at liberty to take copies thereof at their own charge; and the same were to remain with the Master for six months for that purpose, and then the parties were to be at liberty to apply to the Court, to have the deeds delivered out to those to whom they belonged, or for any other purpose relating to the lands contained in the said deeds: And as to all other matters and things, the appellants bill was dismissed, as to the defendant *Mrs Morgan* with costs, to be paid by the appellants; and the respondents *Bond, Walter and Hussy*, were to have their costs out of the testator's estate; and the defendants *Farewell* and his wife to have 40s. costs out of the trust estate; and the appellants to have their costs as to that part of the bill which related to the raising the 5000*l.* out of the trust estate, till the same should be raised.

C. Talbot.
J. Floyer.

From so much of this decree as dismissed the appellant's bill relative to *William Okeden's* purchase, they appealed; and on their behalf it was urged, that *William Okeden*, not having advanced any thing to his daughter either upon or after her marriage, she and her husband and children were, at the time of this purchase, under the most extreme want and necessity; from whence, as well as from their ignorance of the real value of the estate, which was in *Okeden's* possession, and from the influence of his paternal authority, they were liable to be imposed upon by him. That the great disparity between the real value of the estate, and the sum of 500*l.* advanced by *Okeden* for the purchase of it, was a strong proof of his having taken an unreasonable advantage of *Gliffon's* distress, ignorance, and dependance upon him; it appearing fully in the cause, that the estate was then worth 1800*l.* to be sold. And tho' he was entitled to an estate for life therein, as tenant by the curtesy, yet there ought not upon that account to have been a deduction of more than one third, at the most, which would have left above 1200*l.* as the value of the inheritance purchased by him. And this unkindness to his daughter, *Mr. Okeden* compleated by his

his will, whereby he totally disinherited her, and left not only the estate in question, but also all his family estate which was in his power to dispose of, to his two natural sons. It was therefore prayed, that the decree might be reversed as to this point; that the pretended sale might be set aside, and considered as a security only for what was really paid by *Okeden*, as the consideration thereof; and that upon repayment of the same with interest, after a deduction of the profits which had grown due since his death, the estate might be reconveyed to the appellants *Mary* and *Magdalen*, and their heirs; and that they might have their costs out of his estate.

On the other side it was said, that there was not the least proof of any fraud or imposition upon *Gliffon* or his wife, in obtaining this purchase; but on the contrary, it appeared clearly by the evidence, that they themselves first applied to, and afterwards pressed Mr. *Okeden* to become the purchaser; that several treaties were had about it, and even when the price was agreed upon, he gave them time to procure a better purchaser; and that the conveyances were not executed, nor the agreement itself compleated, till a considerable time had been spent in seeking for a better purchaser, and they themselves declared they could not find one. That the purchase was only of a reversion after an estate for life, of an undivided moiety then let at 70 *l. per ann.* out of which was allowed by the landlord 8 *l. per ann.* in lieu of tythes, and all other rates, taxes, repairs, and outgoings to which the premisses were liable, and part thereof consisted in old houses; so that this bargain upon the face of it could not be very beneficial, and it appeared in fact, that 500 *l.* was the most which could be got for it. But how advantageous soever the purchase might be, it was a fair agreement between parties who were capable of contracting, and had a right to dispose of their own; and it was apprehended to be no ground for a Court of Equity to set aside an agreement made without fraud or deceit, because one party happened to have a good bargain. That *Gliffon* himself never complained of being injured by the sale, but quietly acquiesced till his death, which was six years after; and it was submitted, that an attempt to set aside a purchase after so great a length of time, and upon a charge of gross fraud and imposition, without any proof to support it, was very vexatious; and that therefore the appeal ought to be dismissed with costs.

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Case 8
DECREE
reversed.
Jour. vol. 23.
P. 657.

BUT, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that so much of the decree as was therein complained of, should be reversed : And it was further ORDERED and ADJUDGED, that the deeds of lease and release of the 17th and 18th of July, 1716, should be set aside from being an absolute purchase, and be considered only as a mortgage or security for the money really and *bona fide* paid by *William Okeden* to *William Gliffon*, or to his order, or for his use; and that it should be referred to a Master of the Court of Chancery, to take an account of what was due for principal and interest of the money so paid and advanced by the said *William Okeden*; and that an account should be likewise taken of the rents and profits of the lands and premises comprised in the said deeds, received by the respondents since the said *Okeden's* death, or which might have been received without their wilful default, or thro' the means of the said *William Okeden* in his life-time; and the Master was to make a rest at the end of every year, and deduct that rest first out of the interest, and then out of the principal advanced by the said *Okeden*; and if upon taking the said account, the respondents should be found to be over paid, then they should pay the surplus to the appellants, and deliver up to them the title deeds, and convey one moiety of the said estate, free from all incumbrances, to the appellant *Mary Gould* and her heirs, and the other moiety to the appellant *Magdalen Place* and her heirs: But if on taking the said account, there should be any thing found due to the respondents; then on the appellants payment to them of what should be so found due, the respondents were to convey one moiety of the said lands and estate to the appellant *Mary* and her heirs, and the other moiety to the appellant *Magdalen* and her heirs: And it was further ORDERED, that the respondents should pay the appellants their costs in the Court of Chancery, with respect to that part of the bill which related to the matter appealed from; and that such costs should be taxed by the Master.

Barnaby

The general method of conformity directed and intended by this act is to renounce before the Bishop of the diocese in which

Barnaby Carrol, Esq; Appellant.

Case 82.

Richard Vicars, Gent. Respondent.

2d April, 1731.

BY an act passed in Ireland, 2^o *Anna*, intituled, *An act to prevent the further growth of popery*; "it is enacted, that
 "every papist, or person professing the popish religion, shall,
 "from and after the 24th of *March*, 1703, be disabled and is
 "thereby made incapable to buy and purchase either in his,
 "or her own name, or in the name of any other person or
 "persons for his or her use, or in trust for him or her, any
 "manors, lands, tenements, or hereditaments, or any rent or
 "profits out of the same, or any leases or terms thereof, other
 "than any term of years not exceeding 31 years, whereon a
 "rent not less than two thirds of the improved yearly value,
 "at the time of making such lease of the tenements leased,
 "shall be reserved and made payable during such term: And
 "that all and singular estates, terms, or any other interests
 "or profits whatsoever, other than such leases not exceeding
 "31 years as aforesaid, of, in, or out of such lands, tene-
 "ments, or hereditaments, from and after the said 24th day
 "of *March*, to be bought and purchased by or for the use
 "and behoof of any such papist, or person or persons pro-
 "fessing the popish religion, or upon any trust or confidence,
 "mediately or immediately, to or for the benefit, use, or
 "advantage of any such person or persons professing the popish
 "religion; shall be utterly void and of none effect to all
 "intents, constructions and purposes whatsoever: And the
 "children of papists are to be taken to be papists, till they
 "shall by their conformity to the established church appear to
 "be protestants, and no person can take benefit by the said
 "act, as a protestant within the true intent and meaning
 "thereof, that does not conform to the church of *Ireland*, as
 "by law established, and subscribe the declaration, and take
 "and subscribe the oath of abjuration."

The general method of conformity directed and intended by
 this act, is to renounce, before the Bishop of the diocese in
 which

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which the papist shall inhabit, the errors of the church of Rome, and inroll in the Court of Chancery a certificate thereof from the Bishop, testifying his being a protestant and conforming to the church of *Ireland* as by law established. And about the time of passing this act, it was thought sufficient for the convert to renounce popery before the Bishop of the diocese to which he dwelt, as being the fittest to judge of the convert's sincerity, and inroll his certificate to shew himself a protestant; but it being found afterwards, that many such pretended converts had notoriously eluded the act, another act was passed 8^o *Annæ*, to explain and amend the former act; and by this latter statute it was enacted, "that all lands, tenements and hereditaments, conveyed or leased to any papist, or person professing the popish religion, contrary to the true intent and meaning of the said acts, shall and may be sued for and recovered by any protestant; who shall have execution to be put in seisin and possession thereof, to hold to and enjoy according to the estate and interest which such papist, or person professing the popish religion, should have had therein, had he been qualified to purchase, hold and enjoy the same: And further, that no person who hath turned, or shall turn from the popish to the protestant religion, shall be deemed or taken to be a protestant within the intention of either of the said acts, or take any benefit thereby (notwithstanding such person so professing himself a protestant shall, pursuant to either of the said acts, procure the certificate of the Bishop of the diocese) unless such person shall, within six months next after declaring himself a protestant, or within six months after he shall attain the age of 18 years (or those who have already been converted, do before the 25th of *December*, 1709,) or within three months after he or they shall return to *Ireland*, if out of it, take and receive the holy sacrament of the Lord's supper according to the usage of the church of *Ireland*; and make and subscribe the declaration and take the oath of abjuration, and file in the Court of Chancery, or some other of his Majesty's four Courts in *Dublin*, a certificate thereof, in such manner as the Bishop's certificate is directed to be filed; any thing in either of the said acts to the contrary notwithstanding."

The

Cases in Parliament.

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The appellant, on the 21st of September, 1723, purchased from *Thomas Vicars*, for 800*l.* several leases and interests in lands and tythes in the *Queen's* county, and in the county of *Kilkenny*; some for lives, others for long terms of years, out of which several rents were reserved: And he purchased from Lord *Ross*, for 158*l.* 1*s.* 8*d.* *Ballylenan* and 20 acres in *Moncurr* in the *King's* county, for his Lordship's life. The appellant also purchased other estates, and was, at the time of these several purchases, a papist, or person professing the popish religion, being born of popish parents, and educated in that religion.

The respondent, being of protestant parents, and educated in the protestant religion, on the 13th of February, 1723, filed his bill, as a protestant discoverer on the said acts, in the Court of Exchequer in *Ireland*, against the appellant and the said *Thomas Vicars*, to recover the benefit of the several estates so purchased.

The appellant, after many great and affected delays, filed two insufficient answers, but did not file his third answer, until the 8th of May, 1727, being about three years and three months after the bill was filed: And by this answer he insisted, that the respondent was a Dragoon in the late King *James's* army, and then went to mass, and had not since conformed to the established church; and therefore was not qualified to be a protestant discoverer.—That the appellant, about 1702, went to *London*, where he became, and had ever since continued, a protestant: He confessed the purchases from *Thomas Vicars* and Lord *Ross*, but denied any other purchase, except one from *Thomas Short*: He, however, insisted, that *Owen Carrol*, the appellant's father, on his intermarriage with the appellant's mother, settled the lands purchased from *Short*, to the use of himself for life; remainder in tail male to the issue of that marriage, of which the appellant was the eldest son. That *Owen*, his father, being attainted of high treason, on account of the rebellion in *Ireland*, his estate for life was forfeited, and sold to *Short* by the trustees for forfeitures, who had in him only an estate for *Owen's* life, which the appellant purchased; and that *Owen* died a few months after: He admitted, that he was born of popish parents; but insisted, that at the times of the said purchases

chaies he was a protestant, and qualified to purchase, within the intent and meaning of the said acts.

The respondent filed his replication on the 20th of November, 1727, and soon afterwards, a commission to examine witnesses, as well for the appellant as for the respondent, issued and was executed in the *Queen's* county, where the respondent examined many witnesses, but the appellant none; tho' both his commissioners joined with the respondent's commissioners,

On the *Effoign* day of *Easter* term, 1728, the first rule for publication was granted, and publication would, in four days after, have passed absolutely, according to the standing rules of the Court, unless the appellant could have shewn by affidavit, that he had witnesses to examine, and that he could not, for good reasons, have examined them on the former commission; but the appellant's attorney, not having any such affidavit, prevailed with the respondent's attorney to enter into the following consent, which was signed by both attorneys, viz. "By consent of plaintiff's and defendant's attornies, plaintiff and defendant are at liberty to examine and cross examine to the *Effoign* day of next *Michaelmas* term; publication then to pass without further motion, and defendant to appear *gratis*, without service of process, or suffering a conditional decree."

And this consent was, on the motion of the appellant's attorney, made an order of Court on the 14th of *May* following.

In pursuance of this order, the appellant examined several witnesses in *Ireland*, and also took out a commission and examined several others at *St. Dunstan's* coffee-house in *London*, and returned their depositions.

On the 9th of November, 1728, the appellant moved to respite publication, and that he might have commissions to examine witnesses at *Utrecht* in *Holland*, and in or near *Paris*, and also in *Ireland*; alleging, that the said consent was entered into without his direction or privity, and that *Cornelius Van Eck* and *Gulielmus Van de Water* and others, living at *Utrecht*, and *Richard Warburton* of the *Queen's* county in *Ireland*, (then in or near *Paris*) were very material witnesses, without whose testimony, as he was advised, he could not safely proceed to a hearing; and that *Warburton* being in *London* some short time before

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before the 13th of *August*, and intending to go to *Paris* before that day, he endeavoured to prevail on him to stay and be examined, which he refused, and went for *Holland*; and that one of the respondent's commissioners refused to join and examine *Warburton* before he went.

This motion the respondent opposed, by shewing the many affected delays of the appellant, and that whilst the cause was delayed, he received the profits of the lands, but did not pay the chief landlord's rents, or other necessary outgoings: That but for the said consent, the appellant could not, according to the practice of the Court, have examined any witnesses after the first time for passing publication, and that therefore the said consent was greatly to the appellant's advantage: That issue being joined on the 12th of *February*, 1727, the appellant might have had a commission, and examined in *Utrecht* between that day and the 3d of *November* following, if he had thought fit; the respondent also produced to the Court an affidavit, that *Warburton* was in *Ireland* twelve months before the 12th of *April*, 1728, and in *Dublin* fourteen days before that time; so that the appellant might have examined him either by commission in *Ireland*, or before a Baron of the Exchequer in *Dublin*.—And upon hearing counsel on both sides, the Court thought proper to refuse the motion, and ordered publication to pass.

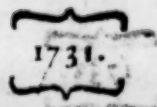
On the 2d and 3d of *December*, 1728, the cause was heard, when an attested copy of the memorial of the purchase from Lord *Ross*, by lease and release of the 6th and 7th of *February*, 1722, registered in the Register's office; and an attested copy of the inrolment of a certificate from the Archbishop of *Dublin*, certifying, that it was on the 5th of *February*, 1723, that the appellant renounced, before him, the errors of the church of *Rome*, and was, by his Grace's order, received into the communion of, and did conform to the church of *Ireland*, as by law established, were read; and the respondent fully proved, by the testimony of many credible witnesses, that the appellant was born of popish parents, educated in the popish religion, went to *England* in 1702, and returned to *Ireland* in 1709; when, according to the said acts, to make him a protestant capable of purchasing, he ought, in three months after his return, to have performed all matters required by the acts, and particularly

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cularly to have received the holy sacrament, according to the usage of the church of *Ireland*; but instead thereof, it was fully proved by many credible witnesses, that the appellant, in 1709, went frequently to mass, and publicly received the sacrament in a popish chapel from a priest of the church of *Rome*; and that several times afterwards, as often as he returned to *Ireland*, he went frequently to mass; it was also proved by two witnesses, that he was at mass in 1722, and by one witness, that he professed himself a papist, till within a few months before his father's death; and by another witness, that he was a papist even at his father's death, which happened on the 27th of *August*, 1723, tho' the appellant pretended he, in 1702, became a protestant, and continued so at the time of making the said purchases.—On the other hand, a sheriff's bailiff and some others examined for the appellant, swore that they had seen the respondent, in the late King *James's* time, at mass, and that they had heard he was a Dragoon, when the protestants in *Ireland* were under the persecution of popery; yet, the respondent proved evidently, that he was then but 14 years old, and that he was born of protestant parents, and educated in and always professed the protestant religion. But the appellant not proving that he had performed the requisites of the acts, his counsel insisted, that a papist may become a protestant, and be capable of purchasing lands, without qualifying himself as the acts direct; wherefore the Court declared, that before they would give judgment, they would hear counsel on both sides to that point.

Accordingly, on the 10th of *February* following, the point was fully debated by many counsel on both sides, and the acts were read, and the Court took time to consider and advise, before they would give judgment.—And on the 23d of *June*, 1729, the Court declared, that it fully appeared by the proofs, that the respondent was well qualified and entitled to bring his bill as a protestant discoverer on the said acts; and that the appellant not having performed the requisites by the said acts, nor renounced the errors of the church of *Rome*, as the acts required, until the 5th of *February*, 1723, he was not qualified to purchase or acquire the said several interests and estates from the said *Thomas Vicars* and the Lord *Ross*; and therefore decreed the respondent as a protestant discoverer, to the benefit of the said purchases from *Thomas Vicars* and Lord *Ross*, and an account of the profits of them since filing his bill, with costs

to be taxed; but dismissed the respondents bill with costs as to the other purchases, and ordered injunctions to put the respondent in possession of the said purchases from *Thomas Vicars* and Lord *Ross*.



The appellant therefore appealed, not only from this decree, P. Yorke.
but also from the order of the 9th of November, 1728, for C. Talbot.
passing publication; insisting, that it appeared by the proofs in the cause, that at the time of his making the said several purchases, he was a protestant of the church of *England*, as by law established; and therefore well qualified to purchase lands, &c. none but papists, or persons professing the popish religion, being disabled by the said acts from purchasing. That it also appeared by the proofs, that the respondent having been a Dragoon in King *James's* army, in the *Irish* rebellion of 1688, and having then publicly professed the popish religion, and never since duly conformed according to the acts, was not sufficiently qualified to be a protestant discoverer or informer, or to take any such benefit by those acts, as he now sought; whereas the appellant claimed no benefit thereby, but only to preserve and defend his own property and purchases, honestly made and paid for: And therefore the Court ought to have dismissed the respondent's bill with costs, on his failing to make out a title, by proving his own capacity, and the incapacity of the appellant. That the pretended agreement for publication to pass on the Efoign day, was not only procured by the artful management of the respondent's attorney, without the knowledge or consent of the appellant, who was then in *London*, and calculated to deprive the appellant of his right to examine his witnesses; but the same had been expressly waived by the respondent's examining several witnesses after the Efoign day, contrary to that agreement. That the Court having refused to grant commissions for examining Mr. *Warburton* in *Paris*, and the several other material witnesses at *Utrecht*, the appellant was thereby debarred from the benefit of their testimony on the hearing; which would have greatly strengthened the evidence of his other witnesses examined in the cause, and fully proved that the appellant was a student actually residing at *Utrecht* in 1709, at the very time when one of the respondent's popish witnesses falsely swore to have seen him at mass in *Ireland*. That if such popish combinations against protestants, whose parents have been papists, were not discouraged, and real

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converts secured in their rights and properties, the several acts of Parliament made to prevent the growth of popery, would have a contrary effect; and papists would be discouraged from becoming protestants, at the same time that protestants in all popish countries, were greatly encouraged to become papists. That if taking the oaths of allegiance, abjuration and supremacy, and making and subscribing the declaration, as by law required, should not be adjudged a sufficient proof of a papist's becoming a protestant, without a formal renunciation before a Bishop, which the appellant also made eight days before the respondent filed his bill; it would endanger the rights and properties of several protestant converts, especially among the Presbyterians, Anabaptists, Quakers and other dissenters, who, by their principles, do not allow episcopacy, and consequently cannot make such a renunciation; and to compel them thereto, would be deemed a persecution and violation of the toleration acts, and contrary to the true intent and meaning of the two *Irish* acts, on which this suit was founded. It was therefore hoped, that the decree would be reversed, and the respondent's bill dismissed with costs.

T. Lutwyche.

D. Ryder.

On the other side it was argued, that as to the order for passing publication, it was too late to appeal from it after publication had actually passed, the proofs seen, and a decree made; and if that order should now be reversed, it would be to give the appellant the liberty of examining witnesses, contrary to the most certain and established rules of all Courts of Equity; which, to prevent perjury, never suffers the parties to examine witnesses, after the former depositions are once published and known. Besides, it was improbable that the appellant could prove in *Holland* his renouncing popery, and performing the other requisites of the acts in *Ireland*; and to prove that he renounced it in *Utrecht*, would not make him a protestant in *Ireland*. But further, the affidavits on which the appellant moved were insufficient, and did not, according to the rules of Equity, shew to what facts he would examine in foreign parts; so that the Court might judge whether they were material or not, and if material, grant a commission, unless the respondent would agree to admit such facts at the hearing. — And as to the decree, it was contended to be well founded, because the respondent was of protestant parents, always educated a protestant, and therefore well qualified to be a protestant discoverer

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verer under the said acts; but the appellant was of popish parents, and educated in the popish religion; and being an *Irish* papist, and not having renounced popery, nor obtained and inrolled the Bishop's certificate, or received the sacrament according to the usage of the church of *Ireland*, nor performed the other matters required by the acts, to make him be considered as a protestant; he was not qualified as a protestant, when he made the purchases in question: For, by the Archbishop of *Dublin's* certificate it appeared, that the appellant's conformity was subsequent to the making of those purchases. That tho' the appellant said in his answer, that in 1702, when but 11 or 12 years of age, he went to *London*, and there became a protestant, and continued so at the time of his making the purchases; yet there was the fullest proof, that several years after 1702, he received the sacrament in *Ireland*, according to the usage of the church of *Rome*, and continued so to do, as often as he returned from abroad to *Ireland*; and that in 1720 and 1722 he went to mass, and was a papist to the time of his father's death in *August* 1723. That the intent of the two acts of Parliament above stated, was to strengthen the protestant and weaken the popish interest in *Ireland*, and thereby secure the church and state, which had been frequently in the most imminent danger, from the practices of *Irish* papists; it was therefore of the utmost consequence, and the direct view of those acts, to keep the lands out of their hands, that they might not have large clans, ready to rise with them in rebellion; And it being a known rule in the construction of acts of Parliament, that such as are made to prevent a public mischief, should receive the most liberal construction, to answer the ends thereby intended; it was apprehended, that there could scarcely be a case, in which that rule ought to be more followed than the present. That after passing the act 2^d *Anna*, the Legislature found that many shifts and evasions had been practised, to elude that law; and therefore by the act 8th *Anna*, they directed the several other requisites to be performed, as the strongest ties which human policy could invent, to shew the sincerity of the party; and therefore, until those requisites were performed, no person converted, or to be converted, should be deemed a protestant within the intent and meaning of either of the acts, even tho' he should obtain and inrol the Bishop's certificate of his recantation. And lastly, that tho' the matters in dispute

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in this cause were but of small value, yet it was presumed, that the event of it would greatly affect the protestant interest in *Ireland*; and would be a lasting precedent to posterity, to direct what matters *Irish* papists, declaring themselves converts, must perform to shew their sincerity, before they could be qualified to purchase lands in *Ireland*. It was therefore hoped, that the appeal would be dismissed with costs.

DECREE
affirmed,
Jour. vol. 23.
p. 658.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

Case 83.

Robert Richardson, Esq; and Elizabeth } Appellants.
his Wife,

John Sedgwick, Gent. and Elizabeth } Respondents.
his Wife, and *Edmund Duckett,*

12th April, 1731.

THE appellant *Elizabeth* was a near relation of Mr. *Thomas Penne*, who being advanced in years, and having no issue, expressed a very great regard for her and her children; and frequently declared, that he would leave them the bulk of his estate at his death.

In 1713, the appellant *Robert* was indebted to Mr. *Penne* in 50*l.* and being then engaged in a Chancery suit in relation to the lands and tenements after mentioned, and wanting money to supply that and other occasions of his family, Mr. *Penne* very readily undertook to furnish the same; and was desirous, that not only what he had so advanced, or might advance to or for the use of the appellant *Robert*, should at least from and after his the said *Penne*'s decease, remain for the separate use of the appellant *Elizabeth*, or in case of her death, for the benefit of her children; but also that several lands and tenements in the counties of *Durham* and *Middlesex*, and in the city of *London*, being part leasehold and part freehold of inheritance, which the appellant *Robert* was entitled to, should, in the first

place,

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place, be made a security for the monies so lent, or to be lent; and subject thereto, should be settled so as that the appellant *Elizabeth* and her children might have the benefit of them. Accordingly, the appellant *Robert*, for these considerations, was prevailed upon to execute to Mr. *Penne* a bond in the penalty of 1000*l.* bearing date the 2d of *January*, 1713, which Mr. *Penne* himself brought ready prepared; and to which there was a condition under written, that if the appellant *Robert*, his heirs, executors, or administrators, should pay to Mr. *Penne*, his executors, administrators, or assigns, not only the said 50*l.* but all such further sums as he, his executors, or administrators, should pay to or for the appellant *Robert*, on requesting the same; and should in the mean time, and on reasonable notice, at the charge of Mr. *Penne*, convey to him, his executors and administrators, all the appellant *Robert's* right and title to the said lands and tenements, for securing the payment of the monies so due, or to be due to *Penne*, his executors, or administrators, within six months after the date of such conveyance; and should also on like notice, and at the like charge, by such conveyance, or some other deed, at the election of *Penne*, his executors or administrators, convey to him and them all his the appellant *Robert's* right and title in the said premises, after payment of the said monies, upon special trust and confidence that they should pay to, or suffer to be received by the appellant *Robert* and his assigns, the rents and profits of the said premises to his own use for his life; and after his death, if the appellant *Elizabeth* survived him, should pay to or suffer to be received by her, the rents and profits of the premises for her life, to her own use; and after both their deaths to the use of *Robert* their son, and the issue of his body; and for want thereof, to the right heirs, executors, administrators, and assigns of the appellant *Robert* for ever, for such terms, estate and interest in the premises respectively, as should be therein then to come; then the said bond was to be void.

Some short time before the execution of this bond, the appellant *Robert's* affairs calling him into *Yorkshire*, and the appellant *Elizabeth* being in want of money, acquainted Mr. *Penne* therewith; who thereupon supplied her with several sums: And Mr. *Penne* soon after the bond was executed, being mindful of his said agreement, did of his own accord deliver the said bond to the appellant *Elizabeth* to keep for her own use,

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use, and the same remained for a considerable time in her custody. But Mr. Penne afterwards telling the appellant *Elizabeth*, he was afraid if her husband should get the bond into his hands she would be never the better for it, and desiring for that reason to have it back, the appellant *Elizabeth* returned the same to him; and thereupon Mr. Penne used very particular expressions of care and kindness for the appellant *Elizabeth* and her children, and told her, that he would soon secure to her the monies mentioned in the said bond, in a better manner than by the bare custody thereof.

Accordingly, soon afterwards Mr. Penne caused a deed-poll to be prepared, bearing date the 20th of *April*, 1714, which he duly executed; and after taking notice therein of the aforesaid bond and condition, he, in consideration of the natural love and affection which he had for his niece the appellant *Elizabeth*, and to the intent that the said bond, and all benefit and advantage to be had thereby might, after his decease, be and remain entirely and wholly to and for the use and benefit of the appellant *Elizabeth*, and the issue of her body by the appellant *Robert*; did give and grant to the appellant *Elizabeth*, all and every sum and sums of money which should be due and owing to the said Penne, his executors, administrators and assigns, at the time of his death, or at any time afterwards, on the said bond, and all benefit and profit thereof, to and for her own separate use and maintenance; and in case she should not be living at the death of the said Penne, then he did give and grant the same to *Robert Richardson*, the son of the appellants, and all and every such child and children begotten by the appellant *Robert* on the appellant *Elizabeth*, as should be then living, to be equally divided between them share and share alike; and Mr. Penne did thereby for himself, his executors and administrators, renounce and quit-claim all benefit and advantage to be had by or from the said bond after his death, otherwise than for the benefit of the appellant *Elizabeth* and her children as aforesaid. And this deed-poll Mr. Penne delivered to the appellant *Elizabeth*.

Mr. Penne, at several times after the appellant *Robert* had entered into the said bond, did, upon the foot of the agreement before mentioned, advance to him, or for his use, divers sums of money, for all which the appellant *Robert* gave notes of hand;

but

but such notes were only intended to serve as declarations, or acknowledgments, of what sums Mr. Penne had advanced upon the bond, subsequent to the execution thereof.

On the 13th of October, 1715, Mr. Penne, being then upwards of 60 years old, intermarried with the respondent *Elizabeth*, then *Elizabeth Davis*, of the age of 22, or thereabouts, who used her endeavours to lessen the esteem and kindness which Mr. Penne always had for the appellant *Elizabeth* his niece; and in consequence of many misrepresentations of her conduct, and of the appellant *Robert's* incumbered circumstances, whereby the money which he intended for the appellant *Elizabeth* might be lost, Mr. Penne thought fit to put the bond in suit; but the appellant *Robert* being fearful of this, and of actions by some of his other creditors, withdrew and concealed himself; during which time, Mr. Penne endeavoured to have him arrested at his suit in an action upon the said bond.

But in May, 1723, and before the appellant *Robert* was arrested in any action upon this bond, Mr. Penne died, having first made his will, and thereby devised the residuum of his estate to his wife the respondent *Elizabeth*, and appointed her and the respondent *Duckett* his executors, which will they proved; and the respondent *Elizabeth* having in October, 1727, intermarried with the respondent *Sedgwick*, they soon afterwards put the said bond in suit against the appellant *Robert*, and obtained judgment thereon by default.

The appellant *Elizabeth* having agreed to surrender and yield up her right under the aforesaid deed-poll, to the monies due upon the said bond, in favour of her husband the appellant *Robert*; both the appellants in June, 1728, exhibited their bill in Chancery against the respondents, praying to be relieved against the said bond, judgment and notes, and to have the benefit of the said deed-poll; and that the notes might be delivered up to be cancelled, and for an injunction in the mean time.

To this bill the respondents put in their answers; and thereby admitted, that the monies mentioned in the notes were intended to be secured by the bond, and that the notes were only evidences of what had been advanced upon that security; but denied

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denied that the appellant *Elizabeth* was any way related to Mr. *Penne*, or that he ever executed any such deed-poll; but if he did, they insisted that the same was obtained by surprise or undue means. And accordingly, in *August*, 1728, the respondents filed their cross bill against the appellants; and their son *Robert Richardson*, not praying any relief whatsoever, but charging, *inter alia*, the matters set forth in their answers; that no consideration was paid or given for the said deed poll, and that Mr. *Penne* intended to have called in the money advanced on the bond, and for that purpose endeavoured to have had the appellant *Robert* arrested; and therefore required a discovery of these facts. The appellants and their said son having answered this bill, divers witnesses were examined in the original cause on the part of the appellants; and the respondents examined several witnesses on their part in the cross cause: But in regard no relief was prayed by the cross bill, the appellants did not examine any witnesses in that cause, as looking upon it to be needless and irregular. After the depositions in both causes were actually published, the respondents obtained an order dated the 15th of *January*, 1729, for leave to amend their cross bill, by praying relief against the said deed-poll, and to have it delivered up and cancelled, and the cross bill was amended accordingly; and on the 21st of the same month, they obtained another order, that the depositions taken in one cause should be read as evidence in the other.

On the 11th of *February*, 1729, both causes were heard together before the Lord Chancellor *King*; when the point relied upon by the respondents was, that the deed-poll was not executed by Mr. *Penne*; and thereupon his Lordship was pleased to direct, that there should be a trial at law at the sittings in *London* for the Court of King's Bench, to try whether the said deed-poll of the 20th of *April*, 1714, was the deed of the said *Thomas Penne* or not; after which trial had, either party was to be at liberty to resort back to the Court for further directions.

Accordingly, on the 28th of *May*, 1730, the said issue was tried before the Lord Chief Justice *Raymond*, and several witnesses were examined on both sides; when the jury, to the entire satisfaction of the Court, and without going from the bar,

gave

gave their verdict that the said deed-poll was the deed of the said *Thomas Penne*.

On the 3d of July, 1730, the causes came on to be finally heard upon the equity reserved; when it was insisted upon for the respondents, that the deed-poll being a grant of a *chose en action*, without any valuable consideration was void, and that Mr. *Penne* having endeavoured to arrest the appellant *Robert*, and he having absconded, therefore the said deed-poll ought not to be established, since it would be making the appellant *Robert* take an advantage by his own default: Whereupon his Lordship was pleased to declare his opinion, that the said deed-poll was a good deed; but that the intention of the obligor and obligee in the bond, being that the obligee Mr. *Penne* might at any time during his life, call in the money owing to him by the obligor Mr. *Richardson*; and the intention of the obligee being only to grant to the appellant *Elizabeth*, such sum of money as should be owing from the obligor to the obligee at the time of his death; and it appearing to the Court, that the obligee in his life-time, endeavoured to call in the money from the obligor, and that it was the obligor's fault that the money was not got in; therefore his Lordship did not think fit to give the appellants the relief sought for by their original bill: But decreed, that it should be referred to the Master, to take an account of what was due from the appellant Mr. *Richardson* to the respondents, the executors of Mr. *Penne*, with interest from the time the monies due were severally advanced, and also the costs of the action at law on the said bond, and to tax the appellants their costs at law of the aforesaid issue; and what should be so taxed, was to be deducted out of the monies which should be found due to the respondents, the executors of Mr. *Penne*, and that the appellant Mr. *Richardson* should pay the residue, at such time and place as the Master should appoint; and that in the mean time, an injunction should be awarded to stay all proceedings at law; and that upon payment, the bond and all the notes should be delivered up, and that at the appellant's expence, satisfaction should be acknowledged on the record of the said judgment: But if the appellants should not pay the money at the time and place so to be appointed, the original bill was to stand dismissed with costs, and the injunction to be thereupon dissolved.

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P. Yorke.

T. Lutwyche.

The appellants apprehending this decree to be erroneous, appealed from it; and on their behalf it was said to be manifest from the preamble to the deed-poll, that it was Mr. Penne's express intention, that the bond and all the advantages thereof, should remain wholly and entirely for the benefit of the appellant *Elizabeth* after his death; but this could not be, if Mr. Penne was to have a right of calling in the monies due upon this bond in his life-time for his own benefit; for if the money had been paid, the bond ought to have been delivered up, and then it could not remain for the benefit of Mrs. *Richardson*: Besides, the deed-poll was absolute, and not subject to any condition, or power of revocation. That though Mr. Penne did sue the appellant *Robert* upon this bond, yet it ought to be presumed he did so, out of regard to the appellant *Elizabeth*, and in order to recover and otherwise secure the money due thereon for her benefit, agreeable to what appeared to have been his express intention; and therefore, as he did not recover the money, his executors ought to be considered as trustees for the appellant *Elizabeth*, more especially as Mr. Penne's will was totally silent respecting this bond; and as there was not the least proof that by putting the same in suit, he designed to disappoint her of any benefit she was entitled to under the deed-poll, or to withdraw his intended bounty from her. That the appellant *Robert's* absconding, or any other act of his, ought not to turn to the prejudice of the appellant *Elizabeth*, the deed-poll and bond being to remain for her sole and separate benefit; for which reason, she ought in this case to be considered as a third person, distinct from her husband, who claimed no other right thereto, than by the agreement of his wife since Mr. Penne's death. That by sending the appellants to a trial at law as to the execution of the deed-poll, it seemed to have been understood, that if the deed was duly executed, the appellants were entitled to relief thereon; for otherwise such trial was altogether unnecessary. That though no other consideration but natural love and affection was expressed in the deed-poll, yet there was manifestly another consideration for it, namely, the appellant *Robert's* abridging himself of the power he had over his own estates, by agreeing to settle them upon his wife for life; with remainder to her son in tail: And though a *chose en action* is not assignable, yet nothing is more frequent than the establishing

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blishing such assignments in a Court of Equity; and in that respect, the respondents ought to be considered as trustees for the appellants. That the cross bill ought to have been dismissed with costs, not only because no relief was given thereon, but because the allegations of it appeared, by the verdict, to be false and groundless: It ought also to be discountenanced, on account of the extraordinary and unusual management of the respondents, in examining witnesses with a view to relief upon a bill of discovery only, and in applying for and obtaining leave to amend this bill, as a matter of course, after publication had actually passed.

On the other side it was contended to have been Mr. Penne's intention, to reserve to himself a power during his life, of calling in all or any part of the money secured by this bond; and that by the deed he intended only to give the appellant *Elizabeth* so much of that money, as he should think fit to leave outstanding at the time of his death. That it appeared from the many endeavours which Mr. Penne from time to time made use of to get the appellant *Robert* arrested on the bond, that he meant to call in all the money thereby secured, and that no part thereof should remain uncalled in at the time of his death, and consequently, that neither of the appellants should have any benefit thereof. And that the artful endeavours of the appellant *Robert* to prevent being arrested, ought not to turn to his benefit, or to the diminution of Mr. Penne's estate.

C. Talbot.
N. Fazakerley.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

DECREE affirmed.
Jour. vol. 23.
p. 671.

Edward

Case 84. *Edward Fitzgerald, Esq;* - - - Appellant.

Thomas Fitzgerald, Gent. - - - Respondent.

28th April, 1731.

THE appellant having, at several times, from the year 1706 till 1712, paid and advanced to the respondent several considerable sums of money, amounting in the whole to 600*l.* the respondent, for securing thereof, executed to the appellant a bond in the penalty of 1200*l.* conditioned for payment of the said 600*l.* and also a warrant of attorney to confess judgment for the same.

The appellant, out of compassion to the respondent's low circumstances, forbore for several years making any demand of this debt; but in 1724, the respondent coming into the possession of a very considerable fortune, the appellant did then apply to him for payment of the 600*l.* and interest, which the respondent neglecting to comply with, the appellant found himself under a necessity of threatening to put the bond in suit; whereupon the respondent, merely for delay, and to stay the appellant's proceeding at law against him, exhibited his bill in *Easter* term, 1724, in the Court of Chancery in *Great Britain*, for relief against the said bond and warrant of attorney; suggesting, among a variety of other falsehoods, that the bond was given on a marriage brokage account, and that by agreement, it was not to have affected him during his life, but was to have been a demand on his executors or administrators only, after his death.

To this bill the appellant put in his answer, and thereby absolutely denied the several suggestions made in the bill concerning the consideration of the said bond, and the manner of obtaining it; and swore that the same was justly perfected for the considerations before mentioned.

The cause being at issue, several witnesses were examined on both sides, and the same was heard on the 8th of *June*, 1725, before the Lord Chancellor *King*; when his Lordship was pleased to order, that the respondent's bill should stand absolutely dismissed with costs.

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The respondent, far from attempting to controvert the justice of this decree, either by petitioning for a rehearing, or by appealing against it, suffered the same to be duly inrolled; but to elude the force thereof, and to avoid making any satisfaction to the appellant for his said debt and costs, the respondent immediately withdrew into *Ireland*, where the appellant, with great difficulty three years afterwards, procured him to be arrested for the debt due on the said bond.

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Whereupon the respondent caused a bill to be filed against the appellant in the Court of Exchequer in *Ireland*, on the 26th of *November*, 1728, merely for delay and for the same relief, and upon the very same allegations in the bill so dismissed in the Court of Chancery in *Great Britain*, and no other; save only a collusion which he charged between the appellant and his the respondent's agent, and that he was not in *London* when the said cause was heard.

The appellant, living in *London*, could not plead or answer within the usual time; and being forced to pray a *dedimus* to put in his answer, the respondent obtained an injunction of course.

To this bill the appellant, on the 28th of *April*, 1730, pleaded at large, the former bill, answer, proceedings and decree of dismissal inrolled, in bar of so much of this new bill, as sought to draw in question again the same matters: And by his answer, denied the fictitious charge of collusion or combination with the respondent's agent in *England*, or that the respondent was not in *London* at the time the former cause was heard.

On the 23d of *June*, 1730, this plea was argued; but the Court did not think proper to allow it, and dissolve the injunction; they were only pleased to order, that the benefit of the plea should be reserved until the hearing of the cause.

The appellant therefore appealed from this order, insisting, D. Ryder. that the Court of Exchequer in *Ireland* had no right to examine E. Malone. into the justice of the decree of the Court of Chancery in *Great Britain* in the former cause, and therefore ought not to have let the respondent into a fresh inquiry, touching any matter which had there received a final determination; but should have

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allowed the plea, as an absolute bar to so much of the new bill, as sought to draw the same matter into question a second time. That as the merits of the respondent's pretended equity had already been tried in a Court of competent jurisdiction, and found against him; it would be a most unreasonable delay of justice, to make the appellant wait till the same merits should be tried over again in the present cause. And that this was apprehended to be the first instance, where any Court of Judicature, in a *dependent dominion*, ever claimed or pretended to a jurisdiction of this kind; so that it might become a precedent of the most dangerous consequence to all such suitors, as should be under the unhappy necessity of following the persons of their debtors out of this kingdom, in order to obtain justice. It was therefore hoped, that the plea would be allowed with costs, and the injunction dissolved.

No case appears to have been printed on the part of the respondent, nor did any counsel appear for him on the hearing of this appeal.

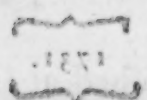
ORDER
reversed.

1731. vol. 23.

P. 492.

AND therefore, after hearing the appellant's counsel, it was ORDERED and ADJUDGED, that the said order of the Court of Exchequer in Ireland should be reversed; and that the plea put in by the appellant should be allowed, and the injunction of the said Court obtained by the respondent, dissolved.

The END of the THIRD VOLUME.



allowed the plea, as an absolute bar to so much of the new bill, as sought to draw the same matter into question a second time. That as the merits of the respondent's pretended equity had already been tried in a Court of competent jurisdiction, and found against him; it would be a most unnecessary delay of justice, to make the same matter be tried over again in the present cause. And that this was apprehended to be the case, where any Court of Judicature, in a dependent dominion, ever claimed or pretended to a jurisdiction of this kind; so that it might become a precedent of the kind, to the unhappy necessity of following the persons of their debtors out of this kingdom, in order to obtain justice. It was therefore dissolved, and the injunction dissolved.

T A B L E O F T H E P R I N C I P A L M A T T E R S

Contained in this VOLUME.

No case appears to have been printed on the part of the respondent, nor did any counsel appear for him on the hearing of this appeal.

Adowson.

AN adowson descending to an heir, is real assets, and may be sold for the payment of debts. Page 556

Agreements.

A. contracts with *B.* for the sale of 200*l.* South-sea stock, for 1360*l.* to be paid on or before the day of shutting the Transfer Books, in order to make the *Christmas* dividend. The money not being paid, *A.* brought his action upon the covenant, and in his declaration alleged, that he attended at the South-sea house for the space of an hour before the shutting of the books, and was ready to transfer the stock to the defendant, but that he was not ready to receive it. On a demurrer, judgment was given for the defendant, the plaintiff not having made a sufficient tender of the stock.

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J. S. agreed to sell a wood upon his estate to *W.* and to give him a certain

time for cutting and carrying it away. The purchaser being interrupted by persons who pretended a title to the estate after the death of *J. S.* who they insisted was only tenant for life, and therefore had no power to sell, brought his bill for a performance of this agreement. The Court, upon the hearing, were of opinion, that this was only a colourable agreement, set up in order to try the defendant's title in equity, which was properly triable at law, and therefore dismissed the bill with costs. But on an appeal, the decree was reversed, and an issue directed to try the title. Page 101

By marriage articles, *A.* makes a provision for his wife by way of jointure, and in bar of dower, &c. *Proviso*, that nothing therein contained, should bar or hinder her from enjoying any legacy or bequest which the husband might give to her; nor should extend to all or any the household goods, or utensils of household stuff, rings, plate, jewels, or linen of the husband at the time of his death: *A.* lived in London, but had a large house furnished

A TABLE of the Principal Matters.

ished at *Geisport*, which he let out to Government as an Hospital. On his death intestate, the widow claimed to be entitled under the articles to the furniture in both houses; but held, that she was only entitled to the furniture of the house in *London*. Page 199

By marriage articles, lands were agreed to be settled on the husband and wife for their lives, remainder to the heirs male of the body of the husband by the wife, remainder to the heirs male of the body of the husband by any other wife, remainders to the *heirs female* of the body of the husband by this wife. A settlement is made before marriage, and expressed to be *in pursuance of the articles*, whereby the lands are limited to the husband for life *sans waste*, and with power to make leases, remainder to the first and other sons of the marriage in tail male, remainder to the first and other sons of any other marriage in tail male, remainder to the *heirs of the body* of the husband. There was issue of this marriage only one daughter, who died in her father's life-time, leaving issue two daughters. The husband having survived his wife, suffered a recovery, and by will devised the premises to his sister. Held, that the granddaughters were entitled to the premises, and the devisee was decreed to convey to them accordingly. 327

Contracts entered into between two persons, to restrain one of them from setting up or exercising a particular trade or employment, within a certain limited district, and for a valuable consideration, are valid. 349

Articles of agreement between husband and wife, are good without the intervention of trustees. Married women having separate estates, being considered in equity as single women with regard to

such estates; and therefore have an absolute power of disposing of them in favour of their husbands, or any other person, notwithstanding their coverture. Page 378

Where an equal agreement cannot, by reason of a subsequent Act of Parliament, or some other lawful impediment, be performed in the whole; yet the same shall be specifically executed in such part of it as remains lawful. 389

A. executes a deed whereby he agrees that his executors, &c. shall, after his death, pay *B.* 2000*l.* in order to purchase an annuity for the life of herself and a bastard child begotten on her by *A.* Equity will compel a specific performance of this agreement. 445

Assets.

Personal estate is the first and immediate fund for the payment of debts, and therefore, though a man devises part of his real estate in trust to be sold, and the money applied in payment of his debts, legacies, &c. and gives the residue of his personal estate not specifically bequeathed to his nephew; yet the personal estate shall be first applied in discharge of the debts, in case of the trust estate; which is not to be sold, unless the other fund proves deficient. 290

An advowson descending to an heir is real assets, and may be sold for the payment of debts. 556

Bonds.

A. being indebted to *B.* upon bond, and there having been a great intimacy between them, *B.* in his last sickness desired his executor not to trouble *A.* for this bond debt. The executor, notwithstanding, after *B.*'s death put the bond in suit; and on a bill filed for an injunction and

A TABLE of the Principal Matters.

and relief, the Court decreed the bond to be delivered up to be cancelled, and satisfaction acknowledged upon the record of the judgment; and that the executor should pay *A.* his costs both at law and in equity. But this decree was reversed by the House of Lords, as to the costs. Page 16

J. S. being indebted to *P.* on bond, *P.* by deed-poll, in consideration of natural love and affection for *E.* the wife of *J. S.* agreed, that this bond, and all benefit and advantage to be had thereby, should, *after his death*, be and remain wholly and entirely for the use and benefit of *E.* and her issue by *J. S.* *P.* afterwards thought fit to put this bond in suit, but before the money was paid, he died. Held, that his executors were entitled to the whole debt, and that his bringing an action upon the bond was sufficient evidence of his intention, that no part of the money should remain for the benefit of *E.* 576

Conditions.

A. devised his estate to his son in tail, remainder to *B.* for life, on condition that he took the name of the testator, but if he did not, then the estate was given over to *D.* The son died without issue, *B.* performed the condition, and died. Held, that *B.* having performed the condition, *D.* took no estate, but that on the death of *B.* it went to the heir at law of *A.* 486

Copyholds.

Where any dispute arises from a confusion in the boundaries of a copyhold estate, a commission of inquiry ought to be directed, with a previous inspection of all deeds and writings. 180

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The heir at law of *J. S.* who was the last of three lives named in the grant of a copyhold estate, brought a bill against the Lord of the Manor, to be admitted to the estate for his own life, and the lives of two other persons whom he should nominate; alledging the custom of the manor so to be. The defendant, by his answer, denied the existence of any such custom, and insisted that he was not by law obliged to renew the copy of any tenements holden of the manor, otherwise than at his own free election and pleasure. The Court, on the hearing, directed an issue to try the custom, but on an appeal this order was reversed, and the bill dismissed. Page 269

Corporations.

The Charter of a Corporation directs, that the Aldermen shall be chosen *annually*, yet this clause is only directory, and does not determine the office of Alderman, at the end of the year after his election; but the person legally elected and sworn into the office shall continue until his death, or removal, in the same manner as a person elected into the office of Mayor. 167

Where a Charter directs, that the Mayor shall continue in office until another is duly elected and *sworn*, the successor, tho' duly elected, cannot act till sworn; and if he does, judgment of ouster may be given against him. 173

A Corporation being empowered by Charter to appoint a Schoolmaster, must, in every matter relative to that appointment, adhere strictly to the tenor of their Charter; and, upon neglecting so to do, are liable to costs. 241

The acceptance of a Charter, whereby the election of Burgesses is directed in a manner

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manner different from what had obtained by ancient usage, the usage being inconsistent with the Charter can no longer subsist, but is determined by the acceptance of the Charter; which must afterwards be the only measure, by which the election of Burgesses is to be governed. Page 428

Costs.

A. on his death-bed desires his executor *not to trouble B. for a bond debt*; the executor, nevertheless, puts the bond in suit. Decreed that he shall deliver up this bond to *B.* to be cancelled, and pay his costs, both at law and in equity. But the decree was reversed as to the costs. 16

Costs do not lie against the defendant to an information, in the nature of a *Quo warranto*. 178

Where the defendant will not admit a general right, but puts the plaintiff to the trouble and expence of proving it, he shall pay the costs of the suit. 203

Although a Jury find only six-pence damages and six-pence costs, yet the party prevailing shall have his costs to be taxed. 222

A. as a creditor of *B.* brings his bill against the proper parties for a sale of *B.*'s estate, alledging, that he had by his will charged it with the payment of his debts. On the trial of an ejectment, a verdict is found against the will, and thereupon *A.*'s bill is dismissed with costs.

But on an appeal, this decree, so far as it related to costs, was reversed. 233

A Corporation nominating a School-master contrary to the particular tenor of their Charter, are liable to costs. 241

Customs.

Where customs are uncertain, unreasonable, or not warranted by the rules of law, no issue ought to be directed by a Court of Equity for trying the existence of them. Page 269

Tythes of fish are payable only by custom, and cannot be claimed as a mere personal tythe *deductis expensis*; for where tythes in kind are due only by custom, it seems impracticable to deduct the expences. 479

Demurrer.

In a bill brought for payment of a legacy, &c. the defendant was charged with having admitted the facts on which the plaintiff's right was founded, in some case stated by him for the opinion of counsel; and therefore the defendant was required to set forth the case *verbatim et literatim*. Defendant demurred, for that the plaintiff was not entitled to any such discovery, and that the opinion was taken for the defendant's own private use and satisfaction. But this demurrer was overruled. 538

Deposit.

A. having borrowed of *B.* 1100*l.* not only gave him a bond for it, but as a collateral security, deposited with him a subscription receipt of the South-sea Company, No. 195. for 500*l.* with liberty to sell it in case default should be made in payment of the debt. Before the bond became payable, *B.* sold this receipt for 2700*l.* but pretended that it was not the receipt deposited by *A.* that receipt being No. 194. for the same sum, and which, after default made in payment of the

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the bond, *B.* sold for no more than 595*l.* On a bill filed against *B.* an issue was directed to try whether the receipt so deposited was No. 195. or 194. and a verdict being found that it was No. 195. *B.* was decreed to account for the difference, with interest and costs. Page 142

Devise.

A. devised to her daughter *E.* my strong box, and whatsoever is in it, and all my chests and cabinets, and whatsoever is in them. This strong box was fixed upon a frame containing several drawers, and in these drawers were found bank notes and other things of value. Held, that the frame and drawers did not pass by the devise of the strong box; but on an appeal, this decree was reversed. 36

A devise of lands to trustees, who are afterwards changed by a codicil, is not revoked by the codicil; but the new trustees shall stand seised upon the trusts of the will, although the word *heirs* is not made use of in the codicil. 107

Lands are devised to *A.* and the heirs of his body, *A.* dies in the life-time of the testator: Held, that the devise thereby became void, and that the only son of *A.* could derive no title under it. 161

A. devises real and personal estate to *B.* for life, with remainder to the heirs of her body; this limitation over is void as to the personal estate, and *B.* shall take it absolutely. 257

J. S. devises lands to be sold for payment of his debts and legacies, and the surplus to be laid out in the purchase of other lands, to be settled on *A.* and *B.* and the survivor of them and their heirs, equally to be divided between them, share and share alike. *A.* died in the life time

of the testator, and the question was, whether his moiety should descend to the testator's heir at law, as a lapsed devise, or should go to *B.* the surviving devisee? Held, that the first part of the devise made *A.* and *B.* plainly joint-tenants, and therefore *B.* by survivorship, became entitled to the whole for life; but that the inheritance being devised to them as tenants in common, one moiety having lapsed by *A.*'s death, in the life-time of the testator, shall descend to the testator's heir at law, expectant on the death of *B.* and that the other moiety shall go to the heir of *B.* Page 297

Devise of a personal estate to *A.* for life, and afterwards for her children, and the yearly interest and produce to be for their maintenance, till the sons attain 21, and the daughters 18, at which ages their respective portions to be paid, and, for want of such issue, then to *B.* *A.* dies without issue; and the devise over to *B.* was held to be good, the words for want of such issue being the same as for want of such children. 383

Lands are devised to trustees and their heirs, in trust to pay several legacies and annuities, and then to pay the surplus of the rents and profits to *A.* during her life, for her separate use, or as she should direct; and, after her death, the trustees were to stand seised to the use of the heirs of her body, with other remainders over. Held, that this was a use executed in the trustees and their heirs during the life of *A.* and that she had only a trust in the surplus rents and profits during her life; and that the subsequent limitation to the trustees, to the use of the heirs of her body, was a use executed in the persons entitled to take by virtue thereof: And therefore, there being only a trust estate in the ancestor, and a use executed in the heirs of her body, these different

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different interests could not unite so as to create an estate tail by operation of law in the ancestor. Page 458

A devise to one, with a limitation over to another if the first devisee dies without issue, creates, in construction of law, an estate tail in the first devisee, as well as if the devise had been to him and the heirs of his body. 467

A devised his estate to his son in tail, remainder to B. for life, on condition that he should change his name, and if he did not, then the testator gave the estate over to D. The son died without issue, B. performed the condition and died: And upon a question, whether D. should have the estate after the death of B. it was held, that D. took no estate on the death of B. but that it went to the heir at law of A. 486

A. devised his real estate to his son F. during his life, remainder after his decease to his eldest son that should be then living, remainders over. F. suffered a recovery, and declared the use to himself in fee. Held, that F. took only an estate for life, and that the recovery was bad. For where a particular estate is expressly given, it shall not be altered by any implication from subsequent words; especially where such implication, if admitted, defeats the general intent of the will. 528

Error.

The Court of B. R. having allowed the sufficiency of a return to a writ of *mandamus*, and therefore refused to grant a peremptory writ, the party applying brought his writ of error in Parliament. But it was held, that no writ of error lay in this case, it being merely an award of the Court, and not a strict formal judgment. 178

A writ of error was brought in B. R. in the life-time of King George I. but was not argued till after the accession of King George II. when the judgment was affirmed. On a writ of error in Parliament, this judgment was reversed; it being held, that the first writ of error (the King being the sole plaintiff in the cause) was absolutely abated. Page 418

Evidence.

Parol proof of a testator's direction to his executor *not to trouble A. for a bond debt*, is sufficient to ground a decree against the executor to deliver up this bond to be cancelled, and acknowledge satisfaction upon the record of the judgment. 16

The entries of a statute-staple, and a defeazance thereon in the book of the Clerk of the Recognizance in the Court of Chancery in *Ireland*, held to be good evidence, the originals not being to be found. 28

An attested copy of an entry in the book of the Chamberlain of *London*, that A. was admitted to the freedom of the City, is not sufficient after his death, to prove him to have been a Freeman, without proving the identity of his person. 47

After publication, the plaintiff files a supplemental bill, and examines witnesses to prove matters which were in issue in the original cause: Held, to be irregular, and the supplemental bill dismissed. 51

A. brought a bill against B. for a specific performance of covenants in a lease, and particularly a covenant to leave a certain quantity of allum upon the premises at the end of the term. The defendant, by his answer, insisted, that this covenant was not intended to be performed;

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formed; but at the hearing produced a paper, purporting to be a receipt from the lessor for this particular quantity of allum. The Court were of opinion, that no regard ought to be had to this paper, not only because it had a suspicious appearance in itself, but because it was not insisted upon in any of the pleadings; and therefore decreed a delivery of the allum.

Page 93

The refusing a party liberty to prove exhibits *viva voce*, at the hearing of a cause in a Court of Equity, is irregular and unprecedented.

119

An old inquisition, *post mortem*, may be read as evidence, without producing the commission upon which it issued; but it is necessary to prove that such a commission did actually issue, which may be done *viva voce*.

208

Affidavits in support of evidence, given on the trial of an issue directed by the Court of Chancery, may be read upon an appeal from the decree of that Court.

214

No proofs can be read on the rehearing of a cause, which were not read on the original hearing.

231

Parol evidence cannot be admitted to explain the written words of a will.

257

Courts of equity will not permit an examination of witnesses *in perpetuam rei memoriam*, in order to defeat the title of a purchaser for a valuable consideration, without notice.

473

The producing a receipt for interest within 20 years, indorsed on a bond by the obligee, is sufficient to take off the presumption of payment; tho' no proof be given when such receipt was written and signed.

535

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Executors.

An executor is under no obligation to give security, nor is it usual for a Court of Equity to compel him to give any security, unless upon affidavit of insolvency or misconduct.

Page 348

But where an executrix marries a second husband in necessitous circumstances, and there are infant children of the first marriage, the Court will appoint a Receiver.

Ibid.

An executor borrows money, or advances it out of his own pocket, to pay some of his testator's creditors who were importunate, and threatened to bring actions, &c. Held, that he is entitled to an allowance of interest for the money so advanced or borrowed.

503

Foreign laws and customs.

By the laws of *Antigua*, all deeds relating to estates within that island, must be registered there in order to make them effectual.

285

And, by the same laws, all the stock, utensils, erections and buildings upon a plantation, are subject and liable to the payment of debts, except Negroes and other slaves, which are deemed to be affixed to the freehold, and cannot be sold for that purpose, unless there is a deficiency of general assets.

289

Fraud.

A. brought his bill for an allowance of a certain sum of money, as a commission upon the sale of goods by auction, where he attended as a puffer to enhance the price of the goods. Bill dismissed

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with

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with costs; the demand being of such a nature, as ought not to have any countenance in a Court of Equity. Page 263

Where a purchaser takes advantage of the distress or ignorance of the vendor, or of any particular authority over him, a Court of Equity will set aside the purchase as fraudulent; even after the purchaser's death. 560

Infant.

An infant is not bound by the decree of a Court of Equity, but must have a reasonable time after he comes of age to shew cause against it.

And, upon his coming of age, he may amend his answer, or put in a new answer; but he cannot amend an original bill, in any points wherein it has been dismissed upon the merits. 301

Where the father of an infant devises the guardianship to the Mother, the Court of Chancery has no power to controul this will, unless upon complaint and proof made of misbehaviour in the Mother. 341

By articles made previous to the marriage of a female infant, it was agreed, that in consideration of a suitable jointure to be made by the husband after the wife should come of age, the whole of her real estate should be limited to the husband in fee. The jointure was accordingly settled, and the wife being of age, was a party to the deed; but it was held, that she was not bound by the articles, and that her acceptance of the jointure, did not amount to a confirmation of them. 514

Injunction.

An injunction was awarded to restore and quiet the plaintiff and his tenants in

the possession of the premises in question; but it was at the same time ordered, that he should appear to an ejectment to be brought by the defendant, in order to try the title. An ejectment was accordingly brought, and the defendant obtained a verdict, and was afterwards put into possession. But on an appeal by the plaintiff, it was ordered, that he should be at liberty to bring an ejectment to recover possession of the premises, and that no mortgage should be set up in bar of his title. Page 276

A lessee covenants not to dig up a particular part of the demised premises for raising sand, gravel, &c. under the penalty of 100 l. per acre. He breaks this covenant, and thereupon the lessor files a bill for an injunction. On affidavit of the waste committed, the injunction is granted till answer and further order. After the answer put in, a motion is made to dissolve the injunction, and upon shewing cause, the defendant consented to appear and plead to an action of debt or trover, and to take short notice of trial; and thereupon the injunction is dissolved. But on an appeal, this order was discharged, and an injunction granted to continue till the hearing of the cause. 374

Insurance.

Policies of insurance against loss or damage by fire, are not, in their nature, assignable; nor can the interest in them be transferred from one person to another, without the express consent of the office. 497

A purchases a house which was insured against fire, and an assignment is accordingly executed. The house is afterwards burnt down, and, subsequent

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to that accident, *A.* assigns the policy of insurance. Held, that the purchaser was not entitled to recover. Page 497

To a bill brought to recover a sum of money upon a policy of insurance, the defendants demurred, because the plaintiff's remedy was at law. Demurrer allowed.

Interest, see tit. Legacies 525

Joint-tenants.

A devise of lands to *B.* and *C.* and the survivor of them and their heirs, equally to be divided between them, share and share alike; *B.* and *C.* are joint-tenants for life, with several inheritances. 297

Jointure.

Lands settled on *A.* for life, for her jointure, are covenanted to be of a certain clear yearly value; after the death of the husband, the jointure lands turn out deficient. The jointress is entitled to have the deficiency made good out of other lands, and to come in as a specialty creditor upon the husband's estate, for the arrears of the deficiency with interest. 187

So where, in marriage articles, the lands agreed to be limited in jointure, are expressed to be of the yearly value of 500*l.* and afterwards prove deficient; this amounts to an agreement that they were of that value, and is a sufficient foundation for making up the deficiency. 402

Issue.

Where a party claims under marriage articles and settlements, made in pursuance thereof, it is not sufficient to direct an issue to try the validity of the articles

only; but the issue should be extended to try the execution of the subsequent settlements. Page 119

On a bill by the Lord of a manor, praying a commission to ascertain the boundaries of a copyhold estate, an issue was directed to try what copyhold lands were in the possession of the defendant. But on an appeal, this decree was reversed, and a commission of inquiry directed, with a previous inspection of all deeds, &c. 180

Legacies.

A. by will, gives all his personal estate to his wife for life, and then gives to his grand-children *T.* and *F.* 100*l.* a-piece, if they attain 21, or shall be married. Held, that these legacies were not payable till after the wife's death; but that the legatees were intitled to have security for the payment of them at that time. 45

J. S. by his will, gives a legacy of 1000*l.* to his niece *E.* at 18, or marriage; and by a codicil directs, that this legacy shall be made up 6000*l.* payable at 21, or marriage; the niece was 18, and under 21, at the time of the testator's making this codicil. Held, that she was entitled to interest for the whole 6000*l.* from the death of the testator, though she had not then attained 21. 113

A. gave all his personal estate to trustees, until *W.* should attain 24, and from thenceforth, in trust for him, his executors, administrators and assigns. The legatee lived to attain 21, but died intestate before 24. Held, that the representative of *W.* was entitled, as the right vested in him immediately upon the testator's death; and that the age of 24 was mentioned not to prevent the right from vesting in *W.* before that age, but

to

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to direct the trustees as, to the time of payment. Page 337

J. S. devised his real estate to his son *J.* for life, and after his death, if he leaves any issue male, to other persons; and to one of those other persons he gave a legacy of 500*l.* when he should attain 21. *J.* the son, died *without issue*. The legatee also died; and on a bill filed by his administrator for this legacy, the question was, whether it did not depend, with his share of the real estate, upon the contingency of the son's leaving issue male. The Court of Chancery held that it did, and therefore dismissed the Bill. But on an appeal, this decree was reversed, and the legacy ordered to be paid, with interest from the testator's death.

A. gives his daughter *B.* a legacy of 1000*l.* to be raised out of the rents and profits of his estate, after payment of his debts, but without mentioning any particular time of payment. This legacy will not carry interest while any of the testator's debts remain unsatisfied, nor will the Court direct it to be raised by a sale of any part of the estate. 353

But the Lord, reversed 4th part of Sec. 2.

Limitations.

A. by deed, settles his estate to himself for life, and then to trustees to raise portions for his younger children: Provided, that if his eldest son (who was otherwise provided for) should pay the portions, then the trustees were to stand seised to the use of him and his right heirs male for ever. The son did not pay the portions, but died intestate, leaving *D.* his daughter and only child. Held, that *D.* being *heir general*, was entitled to the estate subject to the charge laid thereon by her grandfather. 20

An estate is limited in trust to *A.* for life, remainder to trustees to preserve, &c. remainder to his first and other sons in tail male, remainder to *B.* for life, remainder to trustees to preserve, &c. remainder to his first and other sons in tail male, remainder to the right heirs of the grantor. *A.* is a papist, and has no son; the trust, during his life, shall go to the grantor's right heirs, and not to *B.* the next remainder-man. Page 412

Statute of Limitations.

J. S. indebted by simple contract, which was barred by length of time, made his will, and thereby devised lands in trust to pay his debts. This devise does not revive the debt, and a plea of the statute to a bill filed for the benefit of this trust, was allowed. 305

Marriage.

The sentence of the Ecclesiastical Court, in a cause of justification of marriage, is conclusive; and the legality of that marriage, cannot afterwards be agitated in a Court of Equity, even though the proceedings in the Ecclesiastical Court were collusive. 62

Mortgage.

A. being seised of a large estate, mortgages part of it, and the part so mortgaged was afterwards settled by a private Act of Parliament, in trust to pay his debts: But before this trust was performed, *A.* sells part of the mortgage estate. The personal assets of *A.* shall be applied to exonerate the mortgaged estate, descended

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descended to the heir at law of the purchaser.

Page 1

A. made a mortgage to *B.* for 1769 *l.* payable by five equal payments, within the space of five years, with interest at 5 *l. per cent.* But the mortgagor covenanted, that if the money was not paid at those times, or within three months after, he would for every sum, so unpaid, pay the mortgagee interest after the rate of 8 *l. per cent.* until actual payment. The money was not paid according to the terms of the deed, and therefore the mortgagee filed a bill to foreclose. The Court decreed an account of the principal money and interest, at 5 *l. per cent.* only. But on an appeal, this decree was reversed, and the mortgagor was ordered to be charged with interest, at 8 *l. per cent.* from the end of three months after each payment became due. 68

Tenant for life, makes a mortgage in fee, pretending to be seised in fee; the mortgagee not having notice of the settlement, is not bound. 71

A decree of foreclosure, after an acquiescence of 20 years, shall not be set aside upon a bill of review for errors in form only, and not of substance; and therefore a demurrer to such a bill, is good. 315

Land mortgaged for two several terms of one thousand years, was afterwards settled to *A.* in tail, remainder to *B.* in tail, remainder to *A.* in fee, whereby *A.* and *B.* had successively an equity of redemption incident to their estates. *A.* by his will, appointed the mortgage to be paid off, and the terms to be assigned to *M.* and by the same will devised all his lands (being seised of other lands in fee) to *C.* and his heirs. *A.* and *B.* both died without issue, whereby the estate tail was spent; and upon a question, whether the equity of redemption, passed to *M.* by

the will of *A.* and was thereby severed from the reversion, it was held that it did not; and that *M.* stood only in the place of the mortgagee, and was liable to be redeemed by *C.* Page 486

New trial.

On a motion for a new trial of an issue directed by the Court of Chancery, several affidavits were offered to be read, in addition to the evidence given for the defendant on the trial of the issue; but the Court would not permit these affidavits to be read, and the judge having certified his satisfaction with the verdict, the motion was refused. On an appeal, the House of Lords (after debate) suffered the affidavits to be read, but dismissed the appeal, and affirmed the decree. 214

A new trial was granted upon reading some letters of the defendant, wherein he had put a greater yearly value upon the premises in question, than what had been found by the Jury upon the former trial; although these letters were in the plaintiff's power, previous to the former trial, and might have been then produced if he had thought fit. 218

Where, upon a new trial, the former verdict may be given in evidence. 222

Papist.

The statute of 11, 12 William III. c. 4. which disables a papist from purchasing land, disables him also from taking by purchase, and consequently from taking by devise. 412

An Irish Papist conforming any where out of Ireland, cannot purchase lands in that Kingdom, before he has complied with the several requisites of the Irish Acts of 2 & 8 Ann. 567

7 N

Para.

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Paraphernalia.

Where a man's real and personal estate are charged by his will, with the payment of his debts, and afterwards turn out insufficient, his wife's jewels and paraphernalia shall be sold towards making good the deficiency. Page 187

Party.

Where several persons have claims upon an estate in the different characters of purchasers, lessees, and mortgagees, the person claiming the ultimate beneficial interest, must make them all parties to his bill, in order that he may not be harassed with a multiplicity of suits about one and the same matter. 122

Partnership.

A. on behalf of himself and his partners, enters into a contract with B. for the purchase of a certain commodity, but the name of B. only was made use of in the contract. This contract not being performed by B. an action was brought, and a verdict recovered against him. On a bill filed by B. against his partners, to contribute their shares of the damages and costs; held, that they were liable so to do, having paid a proportion of the deposit, and being entitled to an equal share of the profit, if any had been made. 127

Plantations, &c. Foreign

Plea.

A. by his will, made several provisions for his wife, which B. his son and heir, after his death, filed a bill against her to

set aside; alledging, that she was never married to his father, or, if she was, that she had been previously married to P. who was still living. To all the charges in this bill, except what related to her marriage with P. the widow answered; but as to that charge, she pleaded her marriage to the testator, and cohabiting with him as his wife, and that she had by him a son who was still living; and therefore insisted, that she was not compellable to answer the matter of the marriage with P. as it tended to criminate and make her guilty of bigamy, which by law is felony. Plea allowed. Page 65

The plea of a general release, containing the words, *decrees and orders of the Court of Chancery*, is a good bar to any demand set up under a decree of that Court, prior to the date of the release: And if the defendant, by his answer, denies all the charges of fraud, &c. in obtaining the release, such answer is sufficient to corroborate the plea. 366

Where a party pleads his title, and swears himself a purchaser for a valuable consideration, without notice of the plaintiff's title, it is contrary to the usual practice of Courts of Equity, to allow an examination of witnesses *in perpetuam rei memoriam*, in order to defeat the title of such purchaser; but the plaintiff ought to proceed to recover as he can, without the aid of a Court of Equity. 473

To a bill filed in Ireland, the defendant pleads a decree and proceedings for the same matter, in the Court of Chancery of Great Britain. Plea allowed and the bill dismissed. 584

Portions.

A term is created for the purpose of raising, out of the yearly profits, several sums for the maintenance and education of younger

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younger children, until their portions become due; and then, upon trust for raising such sums of money out of the estate, not exceeding 2000*l.* as the father and mother, or the survivor of them, should appoint. Held, that this 2000*l.* should carry interest from the time that it might have been raised out of the yearly rents and profits of the lands; and an enquiry was directed, in order to ascertain that time. Page 51

Lands charged with a portion, afterwards descend to the party entitled to the portion; but this is no extinguishment of the charge, although the value of the lands greatly exceed the amount of the portion. 132

In a marriage settlement, lands are limited to the husband and wife for their lives, remainder to their first and other sons in tail, and in default of issue male, to trustees to raise 2500*l.* for daughters, payable at 21, or marriage, which should first happen, and out of the profits to pay 100*l.* per ann. for maintenance; the first payment of the maintenance to commence after the estate of the trustees shall have come into possession. The husband dies without issue male, leaving a wife and a daughter: Held, that the portion shall not be raised in the mother's life-time, because the maintenance, which is naturally to precede the portion, is not to be paid, till the trustees are in possession. 437

Power.

Tenant for life, with power to make leases of all lands anciently demised, reserving the ancient rents, and of other lands reserving the best improved rents; makes a lease of part of the premises usually demised, reserving the old accustomed rents; and a lease of other part not

usually demised, reserving such sum of money as should amount to the best and most improved yearly rent. Both these leases were held to be void as against the remainder-man; the first, as not being warranted by the power, and the other, for the uncertainty of it. Page 248

Where a power is given to a woman to dispose of her estate by will, and she afterwards marries, it seems that the marriage is a suspension of her power; but if she survives the husband, her power revives. *Sed quære*, for the Lords directed a case for the opinion of the Judges of B. R. 308

Prerogative.

The King, by his prerogative, has a right to present to a Church, which becomes vacant, by his promoting the incumbent to a bishoprick; but this right must be exercised in the life-time of the person promoted, otherwise the King's turn is lost. 427. Note

Revocation.

A conveyance to different uses is an effectual revocation of the former uses, without any recital of the power to revoke. 543

Tender.

In an action upon a contract for the sale of stock, it is necessary for the plaintiff to shew that he had made a legal tender of the stock, before he can claim the money; for his attending at the office on the day, and being ready to transfer, is not sufficient. He ought to set out in his declaration, the manner of transferring stock, and the time and place, when and where it is usually transferred; these be-

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ing matters with the Court cannot take notice of judicially. Page 91

Trust and trustees.

On a reference to a master to take an account of money advanced by a trustee, for the fine, &c. of a lease, three several commissions issue to examine witnesses to prove the articles of the charge. Two of these commissions are returned, but, before the return of the third, the Master makes his report, *ex parte*. This is irregular, the Master must review his report, and all the orders and proceedings grounded upon it, were set aside. 82

A. is a trustee for *B.* as to an estate, and lays out money in relation thereto, after which, *B.* assigns the trust to *C.* who brings a bill for a conveyance of the estate. Held, that *C.* should have no conveyance until *A.* was paid all the money expended by him about the premises. But this decree was reversed; there being no contract between *A.* and *C.* relative to the money so expended. 449

Lands were devised to trustees and their heirs, in trust to pay several legacies and annuities, and then to pay the surplus of the rents and profits to *A.* during her life, for her separate use, or as she should direct; and after her death, the trustees were to stand seised to the use of the heirs of her body, with remainders over. Held, that this was a use executed in the trustees and their heirs, during the life of *A.* and that she had only a trust in the surplus rents and profits, during her life. 458

Tythes.

Tythes of fish are payable only by custom, and cannot be claimed as a mere personal tythe, *deductis expensis*; for where tythes in kind are due only by custom, it seems impracticable to deduct the expences. Page 479

Lands exempted from tythes, as being part of the demesnes of an ancient Monastery, are inclosed by Act of Parliament, but shall not be made liable to tythes by any general words in the Act. 521

Wills.

A codicil attested by three witnesses, and ratifying a will, amounts to a republication of that will, and both ought to be considered together as one will. 107

A will proved in the Ecclesiastical Court, cannot, as to personal estate, be impeached in the Court of Chancery, for the Spiritual Court has the sole jurisdiction of determining wills, so far as they relate to personal estate, and if there be any fraud or imposition in obtaining the will, it is properly examinable in that Court only. 358

But where there is any doubt upon a will respecting lands, the validity of it is to be tried at law; and the Court of Chancery ought not to make any final determination upon the will, before such trial is had. *ibid.*

